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QUESTION PRESENTED

Whether, under the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the minimum wage and overtime provisions of the Fair Labor Standards Act may constitutionally be applied to the employees of a publicly owned and operated mass transit system.

PARTIES TO THE PROCEEDING

In addition to the appellee named in the caption, appellees include the American Public Transit Association and Joe G. Garcia.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The amended opinion of the district court (App. A, *infra*, 1a-20a) is reported at 557 F. Supp. 445.[1] A prior judgment order issued by the district court (App. C, *infra*, 22a-24a) that was vacated by this Court (*Donovan* v. *San Antonio Metropolitan Transit Authority*, No. 81-1728 (June 7, 1982)) is unreported.

JURISDICTION

The amended judgment of the district court (App. D, *infra*, 25a-27a) was entered on February 18, 1983, effective February 14, 1983 (see note 1, *supra*). A notice

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[1] The district court issued a memorandum opinion and judgment on February 14, 1983, but it withdrew the opinion and judgment on February 18, 1983 (App. B, *infra*, 21a) and entered an amended opinion and judgment on that date. The court's February 18 order recites that the amended judgment shall "be effective as of February 14, 1983."

of appeal to this Court (App. E, *infra*, 28a-29a) was filed on March 3, 1983. On April 25, 1983, Justice White extended the time for docketing the appeal to and including June 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, and the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, are set forth in Appendix F, *infra*, 30a-36a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.*, requires covered employers to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. (& Supp. V) 206(a)(1) and 207(a)(1). The original version of the FLSA excluded states and their political subdivisions from the definition of an "employer" used in the minimum wage and overtime provisions; state and municipal employees were accordingly unprotected under these provisions of the Act. See 29 U.S.C. (1940 ed.) 203(d). In 1966, Congress extended the coverage of the FLSA in various respects and eliminated the previously applicable exemption as to virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether operated for profit or on a nonprofit basis, that were deemed to be "[e]nterprise[s] engaged in commerce or in the production of goods for commerce." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Section 102(a), (b), and (c), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(1),

203(s)(4).[2] The constitutionality of this "enterprise concept" of coverage and of the inclusion of publicly operated schools, hospitals, and institutions under the Act was sustained in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).[3]

In addition to schools, hospitals, and institutions, the 1966 FLSA amendments extended coverage to employees of all transit companies "engaged in commerce" that are either publicly owned or privately owned but subject to state or local regulation. Pub. L. No. 89-601, Section 102(a) and (b), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(2).[4] However, the 1966 FLSA amendments did not provide overtime pay protection to drivers, operators, and conductors ("operating employees") employed by transit companies, public or private, brought under the Act. Pub. L. No. 89-601, Section 206(c), 80 Stat. 836, 29 U.S.C. (1970 ed.) 213(b)(7). The plaintiffs in *Maryland* v. *Wirtz* did not challenge the public transit employee provisions of the 1966 FLSA amendments, and the Court had no occasion to consider their validity. See

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[2] The effect of each of these provisions and their interrelationship is explained in *Maryland* v. *Wirtz*, 392 U.S. 183, 185-187 & n.4 (1968).

[3] The Court declined to consider, however, the statutory question whether publicly owned schools, hospitals and institutions characteristically are "engaged in commerce" and are, accordingly, subject to the minimum wage and overtime provisions of the Act, leaving that question open for case by case resolution. *Maryland* v. *Wirtz*, *supra*, 392 U.S. at 200-201.

[4] In 1961, Congress had extended the FLSA to provide minimum wage (but not overtime) protection to employees of certain private mass transit operators. See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Sections 2(c) and 9, 75 Stat. 65, 71-74, 29 U.S.C. (1964 ed.) 203(r), 213(a)(9), 213(b)(7). In 1966, Section 203(d) was amended to bring state or local government operated transit systems within the Act's definition of "employer." Section 203(r) was amended in 1966 to make clear that transit operations, whether public or private (but publicly regulated), are "enterprise[s]" within the meaning of the FLSA and, accordingly, that employees of a transit company engaged in commerce are entitled to the protections of the Act.

269 F. Supp. 826, 827 (D. Md. 1967), aff'd, 392 U.S. 183 (1968).

In 1974, Congress again broadened the coverage of the FLSA. This time virtually all public agencies and their employees were brought within the ambit of the Act. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, Sections 6(a)(1), (4), (5)(D) and (E), and (6), 88 Stat. 58-62, 29 U.S.C. 203(d), 203(r)(3), 203(s)(5), 203(x).[5] The 1974 amendments also set forth a schedule for phasing out the special exclusion from overtime coverage for transit operating personnel established in the 1966 amendments. Pub. L. No. 93-259, Section 21(b)(1)(3), 88 Stat. 68.

The 1974 FLSA amendments were broadly challenged by the states and their political subdivisions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court overruled *Maryland* v. *Wirtz*, *supra*, and restricted Congress' power to extend the protections of the FLSA to public employees.[6] The Court held that the "constitutional doctrine of intergovernmental immunity" (426 U.S. at 837) bars application of the minimum wage and overtime provisions of the FLSA to "the States *qua* States" (*id.* at 847), "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852).

In overruling *Maryland* v. *Wirtz*, *supra*, the Court specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855 (footnote omitted). The Court also listed "such areas as fire prevention, police

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[5] These provisions and their combined effect are described in *National League of Cities* v. *Usery*, 426 U.S. 833, 838-839 (1976).

[6] The plaintiffs in *National League of Cities* did not mount a specific challenge to the public transit provisions of the 1974 FLSA amendments or to the transit provisions of the 1966 FLSA amendments.

protection, sanitation, public health, and parks and recreation" as other examples of traditional state operations. *Id.* at 851, 855. However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities * * * which are well within the area of traditional operations of state and local governments" and that accordingly may not be subject to federal commerce power legislation, where other elements of the test for immunity are satisfied. *Id.* at 851 n.16.

Although the Court thus left unsettled the status of federal legislation affecting a broad range of state governmental functions, it made clear that not all state activity is insulated from the reach of federal commerce power enactments. Indeed, the Court singled out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 854 n.18, quoting *United States* v. *California*, 297 U.S. 175, 182 (1936). The Court commented that "California's activity [in operating a railroad] was not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18.

On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the district court concluded that "[i]t may be appropriate to pro-

vide some protection to the state and local governments" (429 F. Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his FLSA enforcement policy statement, 29 C.F.R. Part 775, so as to provide for listing of governmental activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall*, *supra*, 429 F. Supp. at 706) and published as an interpretative regulation. See 29 C.F.R. 775.2(b) and (d), and 775.3(b). Pursuant to the approved procedure, on December 21, 1979, the Secretary of Labor amended his statement of enforcement policy to include local mass transit systems in the category of government activities not integral to a traditional government function and hence subject to the FLSA. 29 C.F.R. 775.3(b)(3).

2. Appellee San Antonio Metropolitan Transit Authority ("SAMTA") is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982) to serve the San Antonio metropolitan area. SAMTA began operations on March 1, 1978, when it acquired the facilities and equipment of the city-owned San Antonio Transit System, which had begun operations in 1959.[7] Prior to 1959 public transportation in San Antonio was provided by a private transit company.

Since its establishment SAMTA has received substantial federal financial assistance, in the form of grants

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[7] The San Antonio Transit System was operated pursuant to the terms of a private revenue bondholders' indenture with a local bank (App. A, *infra*, 7a n.4).

in aid for capital improvements and operating expenses, as well as technical assistance, under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.* ("UMT Act"). During the first two fiscal years of SAMTA operations the Authority received non-capital grants of approximately $12.5 million, or 30% of its total operating expenses.[8] SAMTA's predecessor, the San Antonio Transit System, had also received substantial federal financial aid prior to the SAMTA takeover. During the period December 1970 through February 1980, SAMTA and its predecessor received $51,689,000 in federal grants, or approximately 40% of their total eligible projects costs of $130,922,194. Of this federal assistance, $31,040,080 represented capital grants under Sections 3 and 5 of the UMT Act; $20,620,270 was operating assistance under Section 5; and $28,654 was technical assistance (research, development, and demonstration grants) under Section 6 of the UMT Act.[9]

3. On November 21, 1979, SAMTA filed a complaint seeking a declaratory judgment that its operations are integral operations of a political subdivision of the State of Texas in an area of traditional governmental functions, and accordingly are exempt, under the rule of *National League of Cities*, from both the minimum wage and overtime provisions of the FLSA.[10] The Secretary

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[8] Brief in Support of SAMTA's Motion for Summary Judgment at 10 (filed Apr. 30, 1980).

[9] Urban Mass Transportation Administration, Office of Management Information Systems, List of All Grants for the City of San Antonio, Texas (Feb. 25, 1980) (Exhibit K to Defendant's Motion for Summary Judgment).

In addition, as of 1979 SAMTA had received federal funding commitments for acquisition of 325 new buses. Urban Mass Transportation Administration, Major Funding Commitments for Buses Since Feb. 1965, as of Sept. 30, 1979 (Exhibit L to Defendant's Motion for Summary Judgment).

[10] In its complaint (at ¶¶ 4-6), filed just before the Secretary published his enforcement policy respecting mass transit (see page 6, *supra*), SAMTA alleged that the Secretary had informally con-

of Labor counterclaimed against SAMTA for enforcement of the overtime and recordkeeping provisions of the Act. 29 U.S.C. 217.[11] The American Public Transit Association, a trade association of public transit operators, intervened as a plaintiff, supporting SAMTA, while Joe G. Garcia, a SAMTA employee, intervened as a defendant, supporting the Secretary.

On November 17, 1981, the district court denied the Secretary's motion for partial summary judgment and entered judgment for SAMTA. The court issued no opinion, but its judgment stated (App. C, *infra*, 23a) that local, publicly operated mass transit systems such as SAMTA constitute integral operations in an area of traditional governmental functions for purposes of applying the rule of *National League of Cities* v. *Usery*, *supra*. The district court accordingly concluded that the Secretary may not enforce the minimum wage and overtime pay provisions of the FLSA against SAMTA and other public transit operators.

4. The Secretary and intervenor-defendant Garcia appealed to this Court pursuant to 28 U.S.C. 1252. This Court vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1981). *Donovan* v. *San Antonio Metropolitan Transit Authority*, Nos. 81-1728 & 81-1735 (June 7, 1982).[12]

5. Upon remand, the district court adhered to its conclusion that the minimum wage and overtime provisions

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cluded that mass transit operations were not within the sphere of intergovernmental immunity, and that employees of SAMTA had, on this basis, begun to assert a right to receive overtime compensation under the FLSA and had indicated their intention to seek remedial relief under the Act.

[11] SAMTA evidently paid its employees the minimum wage at the time in question.

[12] Justices Brennan, White, and Marshall would have noted probable jurisdiction and set the case for oral argument.

of the FLSA may not be applied to publicly owned and operated mass transit systems such as SAMTA (App. A, *infra*, 1a-20a). Although the district court acknowledged that "the historical record *is not* one of predominately [*sic*] public ownership and operation of transit services" (App. A, *infra*, 5a; emphasis in original), it concluded that mass transit "has traditionally been a state prerogative and responsibility" because private transit operations have generally been subject to state or local regulation (*id.* at 6a).

The district court recognized that under *United Transportation Union* v. *Long Island R.R.*, *supra*, the states cannot invoke Tenth Amendment immunity in circumstances where such immunity would "erode federal authority over previously private functions recently converted to public ownership" (App. A, *infra*, 6a). But the court distinguished *Long Island Rail Road* on the ground that the FLSA itself had only recently been extended to cover transit employees in the public sector (App. A, *infra*, 7a-8a). Because other federal commerce power legislation, the application of which to transit companies antedates that of the FLSA, expressly exempts public employers from coverage, the district court stated that "[n]o * * * federal authority exists to be eroded in the area of transit" (*id.* at 20a; see also 9a-10a).

Finally, the district court concluded that mass transit cannot satisfactorily be distinguished from fire prevention, police protection and other public services classified as traditional state functions in *National League of Cities* (App. A, *infra*, 11a-17a). The court thus rejected (*id.* at 13a-17a) the holding of *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983), that the critical role played by federal grant funds in stimulating and underwriting the conversion of transit systems to public ownership differentiates the emerging public role in transit operation from traditional state functions for purposes of delineating the scope of state immunity under the FLSA.

THE QUESTION IS SUBSTANTIAL

This case presents an important question concerning the authority of Congress to require maintenance of reasonable conditions of employment for a substantial class of working men and women employed by enterprises in interstate commerce. The decision of the district court that the protections of the Fair Labor Standards Act may not constitutionally be extended to the employees of publicly owned mass transit systems is contrary to the limiting principle, recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that confines the doctrine of intergovernmental immunity to traditional governmental functions. The district court's decision also disregards this Court's admonition that, in order to establish immunity from federal legislation under the doctrine of *National League of Cities*, a state employer must demonstrate that the legislation "affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 686-687 (1982), quoting *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851. Moreover, the district court's decision is contrary to three decisions by the courts of appeals on the precise question presented. See *Alewine* v. *City Council*, 699 F.2d 1060 (11th Cir. 1983); *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983).[13]

As the courts of appeals have recognized, significant features of the local transit industry and the record of local government participation therein set public transit apart from those "core state functions" (*EEOC* v. *Wyo-*

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[13] The district court's ruling is also contrary to *Scholz* v. *City of LaCrosse*, No. 80-C-238 (W.D. Wis. Sept. 1, 1982), appeal pending, No. 82-2890 (7th Cir.); and *Francis* v. *City of Tallahassee*, 424 So. 2d 61 (Fla. App. 1982).

ming, No. 81-554 (Mar. 2, 1983), slip op. 9) that are generally immune from federal commerce power regulation. First, as the district court acknowledged (App. A, *infra*, 5a; emphasis in original; footnote omitted): "[t]he historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Second, although there has been a marked shift toward public sector operation of mass transit in recent years, that shift was greatly assisted and accelerated by the availability of substantial federal grants under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.* Finally, in entering the field of mass transportation, the states and their subdivisions have chosen to participate in a form of commerce already subject to federal legislation governing significant aspects of the employment relation. Each of these factors serves to distinguish this case from *National League of Cities* itself.

For the foregoing reasons, and because the district court's decision holding the Fair Labor Standards Act unconstitutional as applied to public transit employment will deprive a subtantial number of employees of the protections Congress has established, review by this Court is warranted.

1.a. In *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852 (emphasis added), this Court held that the 1974 amendments to the FLSA that extend minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions." [14] As indicated above (pages 4-5), the Court did

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[14] The Court repeatedly characterized as "traditional" the state activities upon which the federal legislation was deemed impermissibly to intrude. See, *e.g.*, 426 U.S. at 849 "[t]he degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty * * *"), 851 & n.16 ("activities * * * within the area of traditional operations of state and local governments" and "services which the States have traditionally afforded their * * * citizens"), 855 ("those governmental services which the

not purport to provide an "exhaustive catalogue" of local governmental activities that fall within the protected sphere.

In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Court recapitulated the holding of *National League of Cities*, stating (*id.* at 287-288; footnote omitted; emphasis in original):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.[15]

Most recently, the Court has emphasized that "[t]he principle of immunity articulated in *National League of Cities*" does not create "a sacred province of state autonomy" but instead is a "functional doctrine" tailored to "ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' [*National League of Cities* v. *Usery*, *supra*, 426 U.S.] at 845 (quoting *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), not be lost through undue federal interference in certain core state functions." *EEOC* v. *Wyoming*, *supra*, slip op. 8-9.

States and their political subdivisions have traditionally afforded their citizens").

[15] Even where these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." 452 U.S. at 288 n.29. See also *United Transportation Union* v. *Long Island R.R.*, *supra*, 455 U.S. at 684 n.9.

b. Contrary to the view of the district court (App. A, *infra*, 6a, 11a-17a), provision of mass transit services is distinguishable in critical respects from "core state functions" such as public education, safety, health, sanitation, parks, schools and hospitals. First, mass transit is not a traditional local government function. As the district court acknowledged (*id.* at 5a; emphasis in original; footnote omitted): "The historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Until the 1960's mass transit had been predominantly part of the private sector. At the time of World War II, only 20 street railways and bus systems, carrying 7% of the nation's transit riders, were in public ownership. American Public Transit Association, *Transit Fact Book 1981*, at 27.[16] In 1960, only 64 of the 1251 transit systems extant were publicly owned. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 27 (1963) (testimony of Robert Weaver). Mass transit then was still a private enterprise in many of our nation's largest cities, including Atlanta, Baltimore, Buffalo, Cincinnati, Dallas, Denver, Houston, Milwaukee, Minneapolis, New Orleans, Pittsburgh, St. Louis, San Diego and Washington, D.C. *Id.* at 313 (testimony of George W. Anderson, Executive Vice President, American Transit Association).

To be sure, subsequent to the enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V)

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[16] The 1978-1979 edition of the same reference cites the figure of 35 systems in public ownership, but does not vary the percentage of riders carried. *Transit Fact Book* 55. We note with interest that APTA, without material revision in the underlying historical data, has revised its assessment of these facts. The earlier edition of the *Transit Fact Book* concludes that "[p]ublic ownership of transit is a recent development" (*ibid.*). The 1981 edition reverses that judgment, stating: "Public ownership of transit is not a recent development." *Transit Fact Book 1981, supra*, at 27.

1601 *et seq.*, which made substantial federal funds available to local governments for mass transit (see pages 6-7, *supra*, and pages 18-21, *infra*), the trend toward public ownership of transit substantially accelerated. By 1967 over 50% of all transit riders patronized publicly owned systems. *Transit Fact Book 1981*, *supra*, at 27. The latest available information is that slightly over half the operating systems, carrying over 94% of the riders, are now publicly owned.[17] However, many of the cities that have acquired transit systems have contracted out responsibility for operation of these systems to private transit management companies, which are in some cases the very companies that previously owned the systems. Of the 350 publicly owned systems in urbanized areas, more than 120 (including some of the larger systems) are privately managed.[18]

As these statistics indicate, mass transit cannot be deemed "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 855 (footnote omitted)).[19] Nor does the recent trend toward public owner-

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[17] As late as 1981, 336 of the nation's 686 urban mass transit systems and 91 of 339 systems in rural areas were still privately owned. U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 19 (Aug. 1981); U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

[18] U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas over 50,000 Population*, *supra*, at 19.

[19] Indeed, part of the justification for singling out public transit workers for FLSA coverage in 1966, at a time when public employees generally were not within the Act's protection (see pages 2-3 & n.4, *supra*), was to eliminate the competitive advantage that public transit systems had enjoyed over private systems since the latter had been covered by the Act in 1961. See S. Rep. No. 1487, 89th Cong., 2d Sess. 8 (1966).

ship of local transit services justify extension of state immunity under the FLSA to these services. In *United Transportation Union* v. *Long Island R.R.*, *supra*, the Court held that application of the Railway Labor Act to govern labor relations of a state-owned commuter railroad does not trench impermissibly upon state sovereignty. The Court acknowledged that "some passenger railroads have come under state control in recent years" but emphasized that "that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." 455 U.S. at 686 (emphasis in original). The Court accordingly concluded (*ibid.*):

> Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

That conclusion is equally applicable to local public transit systems.

c. The district court acknowledged that mass transit service has traditionally been operated by private enterprise rather than local government. The court reasoned, however, that other transportation activities such as road-building were historically carried out by states (App. A, *infra*, 4a) and suggested that "[m]ass transit is an integral component of a state's transportation system" (*id.* at 5a). But the same could equally have been said of the commuter railroad in *Long Island Rail Road*. Plainly, *National League of Cities* does not require that all forms of transportation be treated as a single service in determining whether application of the wage requirements of the FLSA to public transit operations impairs a state's sovereignty.

The district court's alternative rationale was that historic state *regulation* of local transit service suffices to render mass transit "traditionally * * * a state prerogative and responsibility" (App. A, *infra*, 6a). The court declared (*ibid.*):

> That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history.

This reasoning, which fundamentally misconceives the premise of *National League of Cities*, cannot be reconciled with this Court's decisions. Congress' authority to override state regulation by exercise of its commerce power is well established and is not limited by considerations of state sovereignty. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, 452 U.S. at 289-292. Thus, preemption of state regulatory authority by enactment of the FLSA amendments of 1961, 1966 and 1974 did not run afoul of the Tenth Amendment. Cf. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 397-398 (1951). A history of state *regulation* of private transit enterprise simply cannot be regarded as the equivalent of state *operation* of transit services for this purpose and provides no predicate for treating transit services recently taken over by a public entity as a traditional and essential element of state sovereignty. Cf. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-437 (1980) ("The basic distinction drawn in [*Hughes* v.] *Alexandria Scrap* [*Corp.*, 426 U.S. 794 (1976)] between States as market participants and States as market regulators makes good sense and sound law"); *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), slip op. 3.[20] Indeed, the states' fundamental policy choice

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[20] In *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), the Court observed that "[t]he retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty," and declared that such state proprietary activities are subject to federal Commerce Clause legislation. Slip op. 3 n.6, quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, 452 U.S. at 288. Yet regulation of retail drug sales by private pharmacists (to the extent not preempted by federal law) is assuredly a traditional police power function. See *Whalen* v. *Roe*, 429 U.S. 589, 596-598 (1977). Plainly, the Court did not regard such regulation and direct market partici-

to pursue their objectives through regulation of nongovernment transit providers rather than direct market participation eloquently testifies that, since the inception of the industry, operation of local transit has "not [been] an area that the States have regarded as integral parts of their governmental activities" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 854 n.18).[21]

d. The district court's decision is also inconsistent with *Helvering* v. *Powers*, 293 U.S. 214 (1934). There this Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts (*id.* at 227):

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.

The Court's reasoning in *Powers* is fully applicable here.[22]

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pation by the state as interchangeable for purposes of Tenth Amendment analysis.

[21] Contrary to the district court's suggestion (App. A, *infra*, 6a), states are not free "to select the most suitable means to accomplish their goals in areas of unique and special concern to them." A similar argument was presented, without success, in *Long Island Rail Road*, 80-1925 Resp. Br. 11, 13-14, 27-28. And *EEOC* v. *Wyoming* expressly rejects the contention that *National League of Cities* artificially delimits a "sacred province of state autonomy." Slip op. 9.

[22] In *National League of Cities*, the Court rejected the contention that "'the activities in which the states have traditionally engaged,'" which had been held to mark the "'boundary of the restriction upon the federal taxing power,'" do not supply a like "'limitation upon the plenary power to regulate commerce.'" 426 U.S. at 854, quoting *United States* v. *California*, 297 U.S. 175, 185 (1936). But nothing in *National League of Cities* suggests that Congress'

2. In *Long Island Rail Road*, the Court stated that historical evidence is of paramount importance in the fundamental inquiry as to which state functions are "traditional" for purposes of Tenth Amendment immunity. 455 U.S. at 686-687. The historical evidence recounted above (pages 13-14), and the Court's holding in *Long Island Rail Road*, provide a clear answer to this inquiry in the case of mass transit. But even if these factors were not dispositive, the circumstances under which the recent growth of public ownership of local transit systems occurred confirms that application of the FLSA to public transit employment does not intrude impermissibly upon functions that are essential to the separate and independent existence of the states.

a. The recent conversion of transit systems from private to public ownership was by no means a local phenomenon. Rather, that shift was spurred by enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made available substantial federal financing for public acquisition of private systems and construction of new systems and facilities. By 1964 Congress had recognized the "deterioration or inadequate provision of urban transportation facilities and services" (49 U.S.C. 1601(a)(2)) and had concluded that "[m]ass transportation needs have outstripped the present resources of the cities and States, and [that] a nationwide program can substantially assist in solving transportation problems." H.R. Rep. No. 204, 88th Cong., 1st Sess. 4 (1963). See also *Jackson Transit Authority* v. *Local 1285, Amalgamated Transit Union*, No. 81-411 (June 7, 1982), slip op. 1-2. The UMT Act established a framework "to provide assistance to State and local governments and their instrumentalities in financing [mass transit] systems, to be operated by public or private mass transportation companies as determined by lo-

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power to regulate commerce is *more* limited than the power to tax state activities. See 426 U.S. at 843-844 n.14.

cal needs." 49 U.S.C. 1601(b)(3). Under the provisions the UMT Act, local government bodies with transit responsibilities are eligible to receive federal grants defraying as much as 80% of their capital outlays, including the costs of acquiring local private systems and making capital improvements in them, and up to 50% of their operating deficits. 49 U.S.C. (& Supp. V) 1603(a), 1604(e). By 1978 more than $13 billion in federal aid to transit had been awarded under the UMT Act and other federal programs. *Transit Fact Book*, *supra*, at 57. As indicated above (pages 6-7), both SAMTA and its predecessor, the San Antonio Transit System, were beneficiaries of substantial federal financial assistance.

The enactment of the UMT Act heralded the substantial expansion of the state and local governmental role in providing urban transit described above (pages 13-14). Although it is impossible to state with assurance what would have happened had federal funding not been made available, there is reason to believe that many cities would not have entered the transit business; certainly they had not generally undertaken to perform that service before the advent of federal financing.[23] See, *e.g.*, *Alewine* v. *City Council*, *supra*, 699 F.2d at 1063 ("Augusta stipulated that had it not been for the federal grant, it would not have purchased the assets of the Augusta Coach Company").

Thus, the transfer of responsibility for providing local transit service established not a new integral aspect of state or local government, but a classic venture in "cooperative federalism" in which the states and their subdivisions are free, but are not compelled, to join. See *FERC* v. *Mississippi*, No. 80-1749 (June 1, 1982), slip op. 21-24; *Hodel* v. *Virginia Surface Mining & Reclama-*

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[23] As of September 1976, some 115 cities had used UMT Act funds to acquire local private bus systems. F. Siskind and E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of the Urban Mass Transportation Act of 1964*, at 9-11 (May 1978).

tion Ass'n, supra, 452 U.S. at 289; *Bonnette* v. *California Health & Welfare Agency*, Nos. 81-4565 & 82-4174 (9th Cir. May 5, 1983), slip op. 15-16; *In re Glidden*, 653 F.2d 85, 88 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982).[24] Given the critical role played by the federal government in the development of the national public transit industry, it can hardly be claimed that, although nontraditional, operation of mass transit by the states and localities has become essential to the states' separate and independent existence. As the Sixth Circuit has remarked: "It would indeed be peculiar to hold that federal aid for transit created a situatior where a state which provides transit service is immune from federal labor regulations."

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[24] The federal role in mass transit was not limited to incentives for the substitution of public agencies for private companies, or for the modernization of existing systems. Prior to the enactment of the UMT Act, "[a]s suburban development increased, the tendency was for each community to maintain its political and fiscal individuality and shun comprehensive urban transportation planning." American Public Works Association, *History of Public Works in the United States 1776-1976*, at 178 (1976). The UMT Act, however, was intended to "encourage the planning and establishment of *areawide* urban mass transportation systems." 49 U.S.C. 1601(b)(2) (emphasis added). Congress made funding available for a project only if it was designed as part of a comprehensive area-wide plan, meeting federal criteria for improved transportation, and provided that grants could only be made to public agencies that have the legal and financial authority to carry out such projects. See 49 U.S.C. (Supp. V) 1602(a)(2)(A), 1604(b), 1604(g), 1607; H.R. Rep. No. 204, *supra*, at 14. By means of these requirements, local governments were induced, in many instances for the first time, to band together and to create metropolitan transit systems spanning the entire urban area. For example, appellee SAMTA was created in 1978 to serve Bexar County, Texas, pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982), which authorized creation of metropolitan area-wide transit authorities. Article 1118x was first enacted in 1973.

We note that a significant number of area-wide transit systems operate across state lines. See 49 U.S.C. 1601(a)(1); H.R. Rep. No. 204, *supra*, at 5. Such systems can scarcely be considered outside the scope of federal commerce power legislation.

Dove v. *Chattanooga Area Regional Transportation Authority*, *supra*, 701 F.2d at 53.

b. The district court concluded that federal funding is irrelevant to the question of intergovernmental immunity (App. A, *infra*, 13a-16a). The court below reasoned that: (1) federal subsidies are an exercise of Congress' Spending Power rather than its Commerce Clause authority, (2) federal monies support many of the functions treated as core aspects of sovereignty in *National League of Cities*, and (3) federal funding, especially because it is variable, cannot measure the extent of a state's Tenth Amendment immunity. It is immaterial, however, that federal funding for mass transit does not itself rest upon Congress' Commerce Clause authority. Federal funding is pertinent in this case not because it supplies the constitutional basis for imposing conditions directly upon the states, but because involvement of the federal government in the growth of public transit is a historical fact that indicates that public transit has not become an essential aspect of the states "*separate* and *independent* existence" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851; emphasis added).

Moreover, the role played by federal funding and other requirements of federal law in the public transit industry (see page 20 note 24, *supra*) is quite different from that of federal subsidies supporting traditional local government functions. To be sure, federal monies are available for certain education, public safety, and public health activities undertaken by the states. But the federal share of total local expenditures in these areas is generally less significant than the federal share of expenditures in public transit, particularly in respect to capital costs. And, as noted above, more important than the level of federal assistance is the special role of that assistance as catalyst in the transformation of mass transit from the private sector to the public sector in many localities. There is no similar pattern of transformation of the activities treated as traditional government functions in *National League*

of Cities. On the contrary, those services were provided by virtually every municipality long before federal assistance became available.

c. The recent growth of public ownership in the mass transit industry serves to differentiate public transit from the governmental activities addressed in *National League of Cities* in yet another respect. The states and their subdivisions entered the fields of police and fire protection, public health and sanitation services, hospitals and schools long before the enactment of federal legislation governing terms of employment. And for more than 30 years after the FLSA was enacted Congress recognized the prerogatives of the states in these spheres. The vice of the 1974 amendments to the FLSA thus was the abrupt federal intrusion affecting the entire range of settled patterns of local and state government administration. See 426 U.S. at 845-852; *EEOC* v. *Wyoming*, *supra*, slip op. 12-13.

In contrast, employment relationships in the private transit industry had long been the subject of federal regulatory legislation under the Commerce Clause when, in the 1960's, local governments began in large numbers to acquire transit systems. The nation's basic labor-management relations statute, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, enacted in 1935, applies to the private transit industry just as it does to other industries affecting commerce. See *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963).[25] Moreover, as Congress expanded the scope of national labor legislation, it applied a broad range of federal laws to the private transit

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[25] In *Bus Employees* v. *Wisconsin Board*, *supra*, 340 U.S. at 397-398, the Court rejected the claim that the substantial local interest in the affairs of a private bus company, operated as a public utility under state regulation, precluded application of the NLRA to a labor dispute between the utility and its employees, explaining that "these questions are for legislative determination" (*id.* at 397).

industry, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.* (reporting requirements); the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Section 2(c), 75 Stat. 65-66, 29 U.S.C. (1964 ed.) 203(r) and (s)(2), (minimum wage and child labor standards); the Equal Pay Act of 1963, 29 U.S.C. 206(d) (equal pay for women for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (prohibition against employment discrimination on the basis of race, sex, creed, or national origin); and the Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Sections 102(a), 206(c), 80 Stat. 831, 836, 29 U.S.C. (1970 ed.) 203(r)(2), 213(b)(7) (minimum wage; overtime pay for non-operating employees). These statutes reached the majority of all transit systems, 90% of which were, in 1967, still privately owned. *Transit Fact Book*, *supra*, at 38. Thus, when they acquired private transit companies, state and local governments entered an industry in which employment relations were subject to established federal legislation.

Because of this significant federal regulatory presence, by deciding to operate a mass transit system a municipality "subjects itself to that regulation." *Parden* v. *Terminal Ry.*, 377 U.S. 184, 196 (1964); *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.). This principle was recently reaffirmed in *Long Island Rail Road*. Citing the history of federal regulation of the private rail industry, the Court declared (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

See also *Kramer* v. *New Castle Area Transit Authority*, *supra* (677 F.2d at 310) ("since it is undisputed that

the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area"); *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

The district court concluded, however, that exemption of public transit employment from the requirements of the FLSA would not entail the kind of erosion of federal authority condemned in *Long Island Rail Road* (App. A, *infra*, 6a-11a). The court noted that the FLSA was not applied to private transit until 1961 or to public transit until 1966 and did not extend full protection to transit employees until 1974. But while Congress did not fully exercise its power to legislate respecting terms of employment in the transit industry until relatively recently, there can be no doubt that the constitutional authority to do so has long been available. If the states' acquisition of private transit operations extends intergovernmental immunity thereto, it necessarily involves an erosion of federal constitutional authority. In any event, the fact is that the FLSA *was* made applicable to the private transit industry in 1961 (and, indeed, to public transit in 1966) —before the bulk of the recent conversions to public ownership took place (see pages 3 & n.4 and 13-14, *supra*).[26]

The Court in *Long Island Rail Road* did observe that railroads had long been subject to federal regulatory leg-

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[26] The fact that the overtime provisions of the FLSA were not applied to the transit industry until 1974 does not alter the analysis. Congress had plainly entered the field of wage regulation in the transit industry with the 1961 and 1966 FLSA amendments. The requirement for overtime pay is not regulation fundamentally different from that previously in place. Constitutional immunity may not be founded upon Congress' decision to regulate one aspect of wages in a given industry but not another. Cf. *EEOC* v. *Wyoming*, *supra*, slip op. 15 n.17.

islation, 455 U.S. at 687-688, but there was no suggestion that such longstanding regulation was necessary to the holding that the State of New York could not extend its immunity to a commuter railroad merely by acquiring the railroad. Although the specific federal legislation at issue here is of comparatively recent vintage, it does not follow that the freedom from such regulation of state activities of roughly contemporaneous (or still more recent) vintage is essential to the separate and independent existence of the states. Because of the Supremacy Clause, the interests of the states and those of the federal government do not stand on a par in this area. Rather, within the broad limits of Congress' power to regulate commerce, federal legislation applies to the states to the extent deemed appropriate by Congress unless it is determined, pursuant to the criteria this Court has announced, that such application entails undue interference in core state functions.

In any event, if it were necessary to show that federal regulation of employment in the transit industry was established long before the recent trend toward public operation of mass transit, the longstanding application of the National Labor Relations Act to the transit industry supplies the necessary predicate. Indeed, in *Long Island Rail Road* the Court's recitation of the long history of federal railroad legislation was concerned primarily with regulatory schemes other than the Railway Labor Act (RLA), the statute directly in issue there. See 455 U.S. at 687-688. Like the railroad industry, local transit has long been the subject of significant federal statutory regulation.[27] Accordingly, to hold that the FLSA, which ex-

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[27] The district court suggested (App. A, *infra*, 9a, 10a) that statutes such as the NLRA are irrelevant here because Congress itself exempted local government employers from their reach. But the issue is not, as the district court thought (*id.* at 9a), whether "any diminution of federal authority under the NLRA that results from a private to public conversion is * * * consistent with congressional intent." Rather, the NLRA is instructive because it evidences that

pressly covers public transit employment, impermissibly interferes with state sovereignty is to sanction "ero[sion] of federal authority in [an] area[] traditionally subject to federal statutory regulation" (*United Transportation Union* v. *Long Island R.R., supra*, 455 U.S. at 687).[28]

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the transit industry has "traditionally [been] subject to federal statutory regulation" (*United Transportation Union* v. *Long Island R.R., supra*, 455 U.S. at 687). In examining the succession of federal statutes that historically governed commerce by rail, the Court in *Long Island Rail Road* did not pause to inquire whether particular statutes were applicable to publicly operated railroads. The relevance of these statutes was not that they established long-standing regulation of publicly owned railroads; it was sufficient that they established regulation of the heavily private railroad industry. Against this background of federal regulation of the railroad industry, the Court concluded that the RLA, which expressly covers state owned commuter railroads (see 455 U.S. at 682 n.4), does not intrude impermissibly upon matters of state sovereignty. A similar analysis is applicable here. Although Congress has not chosen to apply the NLRA to publicly owned transit systems, Congress has, through the NLRA and other statutes, established extensive federal regulation of labor relations in the transit industry.

[28] Like the district court, our analysis proceeds in terms of the history and role of public operation of transit service generally, rather than upon the specific history of SAMTA. As the Court explained in *EEOC* v. *Wyoming, supra*, slip op. 13, the scope of intergovernmental immunity does not depend upon the special facts of particular cases "which may vary from State to State and time to time, but on a more generalized inquiry, essentially legal rather than factual." See also *Helvering* v. *Powers, supra*, 293 U.S. at 227. The issue requires a uniform nationwide rule based upon national patterns. See *Alewine* v. *City Council, supra*, 699 F.2d at 1068-1069; *Kramer* v. *New Castle Area Transit Authority, supra*, 677 F.2d at 309-310.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1983

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

MEMORANDUM OPINION

At issue in this case is whether operation of a local transit authority by the San Antonio Metropolitan Transit Authority (SAMTA), a political subdivision of the State of Texas, is a "traditional" governmental function entitled to the Tenth Amendment immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

On November 17, 1981, this Court granted Summary Judgment for SAMTA, finding that it performed a traditional state function that met all the requirements for Tenth Amendment immunity from the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* A direct appeal to the Supreme Court pursuant to 28 U.S.C. § 1252 followed. The Supreme Court remanded the case for reconsideration in light of its intervening holding in *United Transportation Union* v. *Long Island Railroad Co.*, 455 U.S. ——, 102 S.Ct. 1349 (1982) (hereinafter *LIRR*). 457 U.S. ——, 102 S.Ct. 2897 (1982).

Upon further consideration, this Court finds nothing in *LIRR* that compels a change in its previous conclusion that operation of a public transit system is a governmental function entitled to Tenth Amendment immunity. When the factors considered by the Supreme Court in *LIRR* are applied to public transit, they indicate that it is once again appropriate to grant Summary Judgment for the Plaintiff and Plaintiff-Intervenor.

In *Usery*, the Supreme Court cut short the long reach of Congress' Commerce Clause power when it held that the Tenth Amendment prohibits the use of Commerce Clause power "to force directly upon the States its (Congress') choice as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. The distinguishing characteristic entitling a state function to Tenth Amendment protection from federal regulations has been described variously as "integral", "essential", "basic", and "traditional". Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult. Until

LIRR the Supreme Court had not supplied guidelines for the application of its constitutional rule. Even after *LIRR*, the Court's own efforts at identifying a sovereign state function have been marked by disagreement. *See, Federal Energy Regulatory Commission* v. *Mississippi*, —— U.S. ——, 102 S.Ct. 2126, 2141 n.30 (1982).

Like *LIRR*, this case deals with the third part of the analysis used in *Hodel* v. *Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 101 S.Ct. 2352 (1981); whether the states' compliance with federal law directly impairs their ability to structure integral operations in areas of traditional functions. *Usery* has already decided that structuring wages is an integral operation. The only question is, therefore, whether public transit is one of "the *numerous* line and support activities which are well within the area of traditional operations of state and local governments." *Usery*, 426 U.S. at 851 n.16 (emphasis added)

LIRR indicates at least three factors must be considered. First, historical reality is important. A long record of state activity in an area is one indication that a function is one of the essential types of activities that states have the primary responsibility for performing and must be free to perform if they are to meet their responsibilities to their citizens.

The focus on historical reality was not, however, intended "to impose a static historical view of state functions". 102 S.Ct. at 1354. Therefore, any other factors that, like historical reality, indicate that a function is presently a basic state prerogative, interference with which would impede the states' ability to fulfill their role in the federalist system, should also be considered. Analogy to the non-exclusive list

of traditional functions set out in *Usery* and analysis under the four-part test developed in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) are both useful for this purpose.

Finally, in the special case of recent conversion of a private sector function to public ownership and operation, the history and scope of federal regulation must be considered to determine whether the conversion has the prohibited effect of eroding longstanding federal authority.

I. Historical Reality

Overseeing, maintaining, and regulating local and regional transportation systems historically has been a state responsibility. *Peel* v. *Florida Department of Transportation*, 600 F.2d 1070, 1083 (5th Cir. 1979). These functions are matters of a "peculiarly local nature", and the states' exercise of their prerogatives in this field has been given great deference. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-24 (1959) (State highway regulations carry a strong presumption of validity.) *See also, Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841, 845-46 (1st Cir. 1982) (State agency that oversees roads and plans to build a mass transit system performs governmental activities traditional "from time immemorial".); *Amersbach*, 598 F.2d at 1037 ("Airports are indispensable" to "a principal mode of passenger transportation" and are therefore "traditional-integral governmental functions."); *United States* v. *Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (Licensing of drivers is an integral state function.); *United States* v. *State Road Department of Florida*, 255 F.2d 516, 518 (5th Cir. 1958) (Building and maintenance of a system of state roads is essentially a governmental function.)

Mass transit is an integral component of a state's transportation system. It has been treated as such from the time of the earliest transportation regulation in Texas up until the present day.[1]

The historical reality of mass transit reveals a long record of state concern and activity in the field. The historical record *is not* one of predominately public ownership and operation of transit services.[2] *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308, 309 (3rd Cir. 1982), *cert. denied*, —— U.S. ——, 51 U.S.L.W. 3527 (January 17, 1983). Instead of owning and operating these services, states chose to manifest their interest through regulation of fares, routes, schedules, franchising, and safety. For example, a 1913 Texas statute gave cities the authority to regulate fares and operations of vehicles used to provide carriage for hire. *See*, fn.1, *supra*, A 1915 City of San Antonio ordinance established franchising, insurance, and safety regulations for all passenger vehicles operated for hire. Ordinance OF1-1 (March 8, 1915). The City continued regulation through ordinances up until 1959,

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[1] A 1913 state statute delegated to cities exclusive control over their streets and highways, including the power to regulate, license and fix fares for vehicles used to provide carriage for hire. 1913 Tex. Gen. Law, ch. 147, § 4, at 314, *as codified*, TEX. REV. CIV. STAT. ANN. art. 1175, §§ 20, 21 (Vernon 1963). A 1975 statute establishing a system of state funding for mass transit contained a policy declaration that "public transportation is an essential component of the state's transportation system." TEX. REV. CIV. STAT. ANN. art. 6663c, § 1(a)(2) (Vernon 1977).

[2] Public ownership and operation was not, however, unusual or unique. Some of the larger metropolitan areas in the country had publicly owned and operated systems as early as the beginning of this century. *Kramer*, 677 F.2d at 309.

when the first steps in the transformation of the system from private to public hands were taken.

This record of state regulatory activity indicates that mass transit has traditionally been a state prerogative and responsibility, not a federal concern. That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history. *Usery* sought to guarantee states the freedom to select the most suitable means to accomplish their goals in areas of unique and special concern to them. States would be victims of a strange irony if they are to be told that they are free to make their own decisions, but that they made the wrong choice and, therefore, decisions that otherwise meet the requirements for Tenth Amendment immunity [3] will be displaced by federal regulations.

II. Recent Conversion and Prior Federal Regulation

Notwithstanding indications of Tenth Amendment immunity arising from a review of history, *LIRR* precludes Tenth Amendment immunity when it would erode federal authority over previously private functions recently converted to public ownership. 102

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[3] While the states' decision to regulate rather than own and operate a function should not control the determination of whether a function is one traditionally associated with the states, the decision may deprive the states of Tenth Amendment immunity for other reasons. *See, Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 2364-69, (1981) where federal regulation of strip mining was found not to infringe on Tenth Amendment guarantees because the regulation did not regulate states as states, which is one of the requirements for Tenth Amendment immunity.

S.Ct. at 1355. The recent history of both mass transit in general and of SAMTA in particular[4] includes such a conversion. *Kramer*, 677 F.2d 309. Unlike the railroad in *LIRR*, however, neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity.

In *LIRR*, the federal statute under attack was the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* The Court found the act to be the most recent in a long history of federal railway labor relations statutes going back to 1888. 102 S.Ct. at 1355.

In this case, the federal statute under attack is the FLSA. Unlike the RLA, the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(9), 52 Stat.

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[4] Bus service in San Antonio was provided by a private company until 1959, when the city purchased the private system. The San Antonio Transit System, as it was called, was operated pursuant to the terms of a private revenue bondholders' indenture with a local bank. In 1978, the system's facilities and equipment were transferred to SAMTA, doing business under the name VIA Metropolitan Transit. SAMTA is a political subdivision of the State of Texas, created pursuant to Article 1118x of Vernon's Annotated Texas Statutes. It came into existence in 1977 by virtue of actions taken by the City Council of San Antonio, which were confirmed in a general election held in November, 1977. That same election authorized SAMTA to collect a one-half percent (½%) sales tax. See Affidavit of Wayne M. Cook, paragraph 2 (filed April 30, 1980); Defendant-Intervenor Garcia's Memorandum in Response to Remand (filed November 15, 1982).

1067 (1938); Pub. L. No. 87-30 §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.

The FLSA was amended again in 1966 and 1974, eventually subjecting public transit employers to the full range of the Act's wage and overtime pay provisions.[8] It is the combined effect of these amendments that is at issue in this case. Because of their recent vintage alone, they cannot be the basis for finding a long standing federal regulatory scheme that will be eroded by a grant of Tenth Amendment immunity. *But cf*, *Scholz* v. *City of LaCrosse*, No. 80-C-238, slip op. (W.D. Wisc., September 1, 1982) (FLSA is the traditional federal regulation that precludes Tenth Amendment immunity for ali public transit.)

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[8] The 1966 amendments extended the FLSA to states and their political subdivisions with respect to schools, hospitals, and "street, urban or interurban electric railway(s), or local trolley or motorbus carrier(s) . . . whose rates and services are subject to regulation by a State or local agency." Pub. L. No. 89-601, § 102, 80 Stat. 831 (1966). These amendments specifically exempted operators, drivers and conductors of such railways and carriers from the overtime provisions of the Act. *Id.* at § 206, 80 Stat. at 836. The constitutionality of these amendments was upheld with respect to schools and hospitals in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). The same provisions were later invalidated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

The 1974 amendments eliminated completely the public employer exemption of the 1938 act and also repealed the overtime exemption for operational employees of transit services. Pub. L. No. 93-259, §§ 6, 21(b)(1), 88 Stat. 58, 68 (1974).

The National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* is another source of federal authority. It is a generally applicable federal statute that has governed labor relations for private transit companies since its enactment in 1935. The NLRA, like the FLSA prior to 1966, contains an exemption for state and local governments. Thus, any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent.

Similarly, the Urban Mass Transportation Act (UMTA), 49 U.S.C. § 1601 *et seq.* will not be eroded by Tenth Amendment immunity. UMTA is an exercise of the Spending Power, implementing federal interests by conditioning federal funding on *voluntary* compliance by states. *See*, discussion at III, A, *infra*. UMTA's labor relations provision, section 13(c), was not intended to impose federal regulation or displace state prerogatives in the field of transit labor relations. *Jackson Transit Authority* v. *Local Div. 1285, Amalgamated Transit Union*, —— U.S. ——, 102 S.Ct. 2202 (1982). Regardless of whether or not Tenth Amendment immunity is granted, states will still have to comply with federal standards if they want to continue receiving federal money.

The effect of federal anti-discrimination statutes will not be eroded by granting transit a Tenth Amendment immunity. *See*, *Pearce* v. *Wichita County*, 590 F.2d 128, 132 (5th Cir. 1979) (ability to discriminate is not a function essential to the separate and independent existence of the states). The Veterans' Reemployment Rights Act, 38 U.S.C.

§ 2021 *et. seq.* will not be eroded by granting transit Tenth Amendment immunity. *Peel*, 600 F.2d 1070.

Nor will the effect of several federal statutes affecting aspects of mass transit other than labor relations be eroded. Defendant cites the Occupational Safety and Health Act, the Employees Retirement Income Security Act and antitrust laws. Post-Hearing Memorandum on Federal Regulations of Transit (filed January 21, 1983). But, each of these statutes has either a statutory or judicial exemption for public employers that is the limitation on federal authority rather than the Tenth Amendment. 29 U.S.C. §§ 652(5), 1003(b)(1); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982). The Clean Air Act will continue to apply. *Friends of the Earth* v. *Carey*, 552 F.2d 25 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977). The federal income tax laws will continue to apply, and public transit employees, like firemen, police officers, nurses and even elected public officials will have to pay their federal income taxes.

Defendant and Defendant-Intervenor have not shown that the effectiveness of any federal statute other than the FLSA, the constitutionality of which is at issue, will be eroded by granting transit Tenth Amendment immunity. In the absence of any erosion of federal authority, nothing in *LIRR* precludes Tenth Amendment immunity for previously private functions converted to public ownership and operation. To the contrary, the rule announced in *LIRR* implicitly recognizes that some conversions—those that do not erode federal authority—will result in Tenth Amendment immunity. Many governmental functions of today have at some time in the past been private functions. To deny Tenth Amendment

immunity on the ground that in the past the private sector was heavily involved in providing transit services would impose precisely the "static historical view of state functions" that *LIRR* eschews. 102 S.Ct. at 1354.

III. Other Factors Indicating Danger to the States' Separate And Independent Existence

LIRR tells courts that tradition is an important consideration because it can reveal whether a government function is so intimately connected with the states that "federal regulation . . . would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" 102 S.Ct. 1355 (citation omitted). With that as the goal of a Tenth Amendment inquiry, a court should go beyond historical analysis and consider other factors that indicate a function is so closely associated with states that Tenth Amendment immunity is required.

A. Analogy

Analogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity. *See, Fry* v. *United States*, 421 U.S. 542, 557-58 (1975) (Rehnquist, J. dissenting; proposes an analogy test); *Scholz*, slip op. at 5 (most productive analysis is by analogy to functions which have been found to be traditional).

Usery stated that fire prevention, police protection, sanitation, public health, and parks and recreation were among the "*numerous* line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 851 n.16 (emphasis added). By over-

ruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court added to this list public schools and hospitals. The only state function specifically taken off the list is state operation of a commuter railroad.[6] *LIRR*, 102 S.Ct. at 1349.

The states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the *Usery* functions. *See*, TEX. REV. CIV. STAT. ANN. art. 1118x, § 6(a) (Vernon 1982 Supp.)[7]

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[6] The Long Island Railroad and SAMTA perform identical functions, transporting commuter passenger to and from homes, work places, schools, and stores. If the railroad is not exempt, then, by analogy, the bus system should not be exempt. Under *LIRR*, however, bus systems must be distinguished from railroad lines on the basis of the absence of a history of federal regulation. See discussion at II, *supra*. For other distinctions between commuter railroads and commuter buses see the brief filed by the United States as an *amicus curiae* in *LIRR*. (attached as Exhibit A to SAMTA'S Reply to the Defendants' Memoranda on Remand (filed November 23, 1982)).

[7] For other state laws decreeing public mass transit to be an essential function of government and showing that the concept embodied in Article 1118x is not unique to Texas, *see Inman Park Restoration, Inc.* v. *Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd*, 576 F.2d 573 (5th Cir. 1978) (quoting an amendment to the state constitution providing that the public transportation of passengers for hire within a metropolitan area is an "essential governmental function"); *Henderson* v. *Metropolitan Atlanta Rapid Transit Authority*, 225 S.E.2d 424, 427 (Ga. 1976) (quoting a Georgia statute providing that MARTA is performing "an essential governmental function"); *Mass Transit Administration* v. *Baltimore County Revenue Authority*, 298 A.2d 413, 415 (Md. Ct. App. 1973); (quoting a Maryland statute that the Metropolitan Transit Authority is "performing an essential governmental function"); *Teamsters*

It is also evident from Congressional debate on public transportation legislation that Congress recognized the similarities between public transit and the *Usery* functions. *See, Metropolitan Mass Transportation Legislation: Hearings Before Subcomm. No. 1 of the House Comm. on Banking and Currency*, 86th Cong., 2d Sess. 14, 26 (1960) ("it is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection and so forth" [statement of Rep. Addonizio] . . . "it is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police and fire protection and other recognized public necessities [statement of Rep. Corbett]); 120 Cong. Rec. 1042 (1974) ("mass transit is as much an essential public service as the fire department or hospitals" [statement of Sen. Biden]); 119 Cong. Rec. 4243 (1973) ("Mass transit is as much a public necessity as sanitation, police protection and education and can have the same overall community benefits." [statement of Sen. Hart]).

Moreover, it is extremely difficult to articulate an adequate basis upon which to distinguish public transit from the *Usery* functions. *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3rd Cir. 1982), *cert. denied*, —— U.S. ——, 51 U.S.L.W. 3527 (January 17, 1983) is a case that presents pre-

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Local Union No. 676 v. *Port Authority Transit Corp.*, 261 A.2d 713, 716 (N.J. Sup. 1970) (same—New Jersey statute); *County of Niagara* v. *Levitt*, 411 N.Y.S.2d 810, 812 (Sup. N.Y. 1978) (same—New York statute); *Pennsylvania* v. *Erie Metropolitan Transit Authority*, 281 A.2d 882, 885 (Pa. 1971) (same—Pennsylvania statute).

cisely the question presented by this case. It distinguished public transit on the basis of the large amount of federal funding made available pursuant to UMTA and denied Tenth Amendment immunity to a public transit authority. The level of federal funding is an unsatisfactory distinction for three reasons.

First, UMTA is an exercise of the Congressional Spending Power granted in Article I, Section 8, Clause 1 of the Constitution. *Voluntary* cooperation by a state with federal regulations enacted as a condition for the receipt of federal funds does not have the same negative implications for state sovereignty as does the unavoidable *imposition* of a federal scheme. Even the Court in *Usery* stopped short of finding that exercises of the Spending Power intruded on states' Tenth Amendment rights. 426 U.S. at 852 n.17. UMTA establishes a system of "cooperative federalism" that resembles a number of other statutes that lack Tenth Amendment implications. *Hodel*, 101 S.Ct. at 2366. If a state does not wish to receive federal transit funds, there can be no suggestion that the federal government is imposing a federal regulatory program that displaces state decisions. *See, United States* v. *Ohio Department of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980), *cert. denied*, 451 U.S. 949 (1981) (federal scheme seeking to enforce state cooperation not a Tenth Amendment violation if state remains free to make essential decisions).

Second, federal funding supports each of the *Usery* functions.[8] At the time *Usery* was decided, the

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[8] Some of the federal statutes authorizing financial support for state functions exempted in *Usery* are as follows:

federal budget called for expenditures of $716 million for law enforcement. 426 U.S. at 878 (Brennan, J., dissenting). During fiscal 1979, the Department of Education alone provided state and local governments with $5.995 billion for education. Special Analysis, Budget of the United States Government Fiscal Year 1981 (Office of Management and Budget), pp. 267-68, table H-11. During 1979, the federal government likewise made grants to state and local governments of $3.756 billion for sewage treatment plant construction, *id.* at 265; $14.377 billion for health, *id.* at 269; and $517 million for the administration of justice, *id.* at 270.

Transit survives on a mix of funding indistinguishable from that relied upon by many of the *Usery* functions. Transit, sanitation, hospitals, higher education and parks all combine operating

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Police: Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701, *et seq.*; Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601, *et seq.*

Fire: Federal Fire Prevention and Control Act of 1974, 15 U.S.C. § 2201, *et seq.*

Education: Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.*

Public Health/Hospitals: Public Health Service Act, 42 U.S.C. § 201, *et seq.* (as amended by the Health Planning and Resources Development Amendments of 1979); Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001, *et seq.*

Parks and Recreation: Urban Park and Recreation Recovery Act of 1978, 16 U.S.C. § 2501, *et seq.*; Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et seq.*

Sanitation: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*; Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301, *et seq.*; Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*

revenues such as fares, user fees, tuition and admission fees with state and local tax revenues and federal subsidies. Institute of Public Administration, Financing Transit: Alternatives for Local Government, Table 10-2 at 228 (July 1979) (attached as Exhibit A to Brief for SAMTA in Opposition to Defendants' Motion to Strike and for Extension of Time (filed August 7, 1980); hereinafter Financing Transit); Affidavit of Wayne M. Cook, paragraph 6 (filed April 3, 1980).

Third, the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity. Federal funding is responsive to changing political demands. Funding levels reveal what the federal government considers its interest to be at any one point in time, but they do not adequately measure a state's sovereign interest.

Importance of a function to a state's citizens is, like federal funding, an inadequate basis for distinguishing public transportation from the *Usery* functions. Certainly, public transit is at least as important as parks and recreation and has as great a community-wide impact as hospitals.

Pervasiveness of government performance of a function is another inadequate distinction. It is true that not all cities and states provide public transit services. Defendant's Memorandum in Response to the Supreme Court Remand at 9-15 (filed November 3, 1982). But, in urban areas, where mass transit is a necessary service, there is pervasive government performance. In 230 of the 279 urban areas identified by the Department of Transportation (DOT), government provides transit services. SAMTA's Reply to the Defendants' Memoranda on Remand at

11 (filed November 23, 1982) (hereinafter SAMTA's Reply). When mass transit service is provided, it is government that provides it over 90 percent of the time. *Kramer*, 677 F.2d at 309. This is a more pervasive government involvement than is present in hospitals, an exempt function under *Usery*. Only 177 of the 279 urbanized areas identified by DOT have hospitals operated by state or local government. SAMTA's Reply at 12.

A function's origins in the private sector is another inadequate basis for distinguishing transit from the exempt *Usery* functions. *LIRR's* admonition against imposing a static historical view of governmental functions means that private sector origins do not legally preclude Tenth Amendment immunity. Hospitals, for example, had private sector origins. *Id.* at 17. Even though the Supreme Court now considers hospitals to have been fully transformed into a traditional and sovereign state function, private sector involvement remains significant. The private sector provides approximately half the hospital services in the United States. *Id;* SAMTA's Memorandum in Response to the Remand at 12 n.5 (filed July 15, 1982).

If transit is to be distinguished from the exempt *Usery* functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it.

B. The *Amersbach* Test

Another method of testing for Tenth Amendment immunity is to evaluate the four factors set out in *Amersbach* v. *City of Cleveland*, *supra*: (1) does the function benefit the community as a whole and is it made available at little or no direct expense; (2) is

the function undertaken for public service rather than pecuniary gain; (3) is government particularly well suited to perform the function because of a community-wide need; and (4) is government the principal provider of the function? 598 F.2d at 1037. When applied to mass transit, these factors indicate that Tenth Amendment immunity is appropriate.

Public transit benefits the community as a whole, helping to eliminate air pollution, alleviate traffic congestion, conserve energy, and stimulate economic development. *See*, policy statements in the Urban Mass Transportation Act, 49 U.S.C. §§ 1601, 1601a, and the National Mass Transportation Assistance Act of 1974, 49 U.S.C. § 1601b; *see also* TEX. REV. CIV. STAT. ANN. art. 1118x, § 1 (Vernon 1982 Supp.). Moreover, public transit is provided at a heavily subsidized price. Fares are nominal and account for only about 25 percent of operating expenses. Affidavit of Wayne M. Cook, at paragraph 6 (filed April 30, 1980). While some of the fare subsidy is from federal funding, a larger portion is from tax revenues collected pursuant to Texas statute. *Id.* The decision by the State of Texas to grant regional transit authorities an independent tax base and the election by San Antonio area voters to impose such a tax on themselves is another indication that public transit benefits the community as a whole.

The reality of transit industry economics is that services cannot be provided at a profit. *See*, 49 U.S.C. § 1601b(3), (4). Even with federal funds available, state and local tax dollars remain the predominate source of support. *See*, Financing Transit at 36. This is a clear indication that government

provides transit for public service, not for pecuniary gain. These same facts indicate that government is particularly well suited to provide transit services. In the absence of a profit motive to attract private enterprise, government is the only component of society that can provide the service.

Finally, government is today the primary provider of transit services. When the total number of transit operations in the United States are counted without respect to size, state and local governments owns and operates only about half the service. But, this is a misleading figure because state and local government provides the overwhelming majority of transit services. By 1978, public transit accounted for 91 percent of total vehicle miles, 91 percent of linked passenger trips, 90 percent of revenues generated, and 87 percent of transit vehicles operated. *Kramer*, 677 F.2d at 309.

IV. Conclusion

The import of *LIRR* is two-fold. First, Tenth Amendment claims must be supported by a showing, based on historical reality or other factors, that when a line between state and federal prerogatives must be drawn, performance of the function at issue falls so clearly on the states' side of the line that imposition of federal authority would undermine the role of the states in our federal system. History indicates that transit falls on the states' side of the line. So do analogy to the *Usery* functions and applications of the *Amersbach* test.

Second, *LIRR* announces a limitation on Tenth Amendment immunity. Notwithstanding indications from history or other factors, states and their political subdivisions may not erode existing federal au-

thority by assuming ownership and operation responsibilities for functions previously performed by the private sector. No such federal authority exists to be eroded in the area of transit. The FLSA provisions challenged here are recent departures from an earlier policy in which Congress recognized states' interest in wage and hour regulation by exempting states. Even the federal regulation that deals most comprehensively with transit, UMTA, declined to impose federal authority, opting instead for a system of voluntary cooperation that recognizes the states' predominate interest in transit.

This Court finds that the imposition of FLSA wage and overtime pay provisions on state transit workers would undermine the states' role as surely as would the imposition of the same provisions on state employees performing police, fire, sanitation services. It is, therefore, ORDERED that Summary Judgment be, and hereby is, reentered in favor of Plaintiff and Plaintiff-Intervenor, and Defendant's and Defendant's-Intervenor's Motions for Partial Summary Judgment be, and hereby are DENIED.

Signed this 18 day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

[Filed Feb. 18, 1983]

ORDER WITHDRAWING MEMORANDUM OPINION AND JUDGMENT

The Memorandum Opinion and Judgment entered by the Court on February 14, 1983 are hereby withdrawn, and the Amended Memorandum Opinion and Amended Judgment attached to this Order are substituted in their place. The Amended Memorandum Opinion and the Amended Judgment shall both be effective as of February 14, 1983.

Signed this 18th day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION, PLAINTIFF-INTERVENOR

v.

THE HONORABLE RAYMOND J. DONOVAN, SECRETARY OF LABOR OF THE UNITED STATES, DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

JUDGMENT

This cause was heard by this Court on September 10, 1981, upon motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association and motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia. The Court has carefully considered the motions, briefs, affidavits and other material on file in this cause and the arguments of counsel and finds that there is no genuine issue as to any material fact in this cause and that the Plaintiff and Plaintiff-Intervenor are entitled to a judgment as a matter of law. The Court accordingly finds that

the motions of San Antonio Metropolitan Transit Authority and American Public Transit Association for summary judgment should be granted and that the motions for partial summary judgment of the Secretary of Labor and Joe G. Garcia should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED:

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby granted;

2. That local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, against local public mass transit systems in the United States, including San Antonio Metropolitan Transit Authority;

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions under *National League of Cities* v. *Usery*, *supra*;

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby denied;

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby dismissed with prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

SIGNED this 17 day of November, 1981.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

JUDGMENT

Pursuant to the order of the United States Supreme Court remanding this case for further consideration, this Court has reviewed its order of November 17, 1981. Upon careful reconsideration of the motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association, the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia, and briefs, affidavits and other materials filed in sup-

port of these motions and in response to the remand, the Court concludes that there is no genuine issue as to any material facts in this cause and that the Plaintiff and Plaintiff-Intervenor are entitled to judgment as a matter of law. Therefore, the motions of San Antonio Metropolitan Transit Authority and American Public Transit Association for summary judgment shall be GRANTED, and the motions for partial summary judgment by the Secretary of Labor and Joe G. Garcia shall be DENIED.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby GRANTED;

2. That mass transit is an area of traditional governmental function under the decisions of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and *United Transportation Union* v. *Long Island Railroad Company*, —— U.S. ——, 102 S.Ct. 1349 (1982), and that the adoption and implementation of wage and overtime pay policies is an integral operation in this area such that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* against publicly owned and operated mass transit systems in the United States, including San Antonio Metropolitan Transit Authority.

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar

as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions;

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby DENIED.

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby DISMISSED with prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

Signed this 18 day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil Action No. 79 CA 457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION, PLAINTIFF-INTERVENOR

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR OF THE UNITED STATES, DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

Filed Mar. 3, 1983

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 1252 and 2101(a), the Secretary of Labor hereby appeals to the Supreme Court of the United States from the amended Judgment of this Court in the above-captioned action entered on February 18, 1983 and effective as of February 14, 1983.

DATED: March 2, 1983

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

EDWARD C. PRADO
United States Attorney

/s/ Dennis G. Linder
DENNIS G. LINDER

/s/ Mark C. Rutzick
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Telephone: (202) 633-3315

APPENDIX F

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. V) 203:

> As used in this chapter—
>
> * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the actvities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees

engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(5) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. V) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the produc-

tion of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, provides in pertinent part:

49 U.S.C. 1601:

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and

other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of area wide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass

transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. (Supp. V) 1603(a):

* * * The Federal grant for any such project to be assisted under Section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. * * *

49 U.S.C. 1604(e):

The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. 1609(c):

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and bene-

fits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

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Nos. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOE G. GARCIA,

v. *Appellant*

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et. al.*, *Appellees*

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

v. *Appellant*

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et. al.*, *Appellees*

On Appeal from the United States District Court for the Western District of Texas

---

BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF A PLENARY HEARING AND AFFIRMANCE OF THE DECISION BELOW

1488

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QUESTION PRESENTED

Whether publicly-owned and operated mass transit systems are a "traditional governmental function."

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IN THE

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INTEREST OF THE AMICI

The *amici* are organizations which represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in the powers and responsibilities of these governments, and in legal issues affecting such powers and responsibilities.

As pointed out *infra*, issues of profound consequence for the authority and functions of state and local jurisdictions are presented by this case. *Amici* are therefore submitting this brief to assist the Court in its consideration of the questions raised by this litigation.[1]

STATEMENT

1. The opinion below is one of several recent lower court decisions on whether a publicly-owned mass transit system is a "traditional governmental function."[2] This question has repeatedly arisen because an activity must be a "traditional" function in order to qualify for Tenth Amendment immunity under the third prong of the immunity test established by this Court. In its entirety, the third prong is that "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" *EEOC* v. *Wyoming*, —— U.S. ——, ——, 103 S.Ct. 1054, 1061 (1983).

The lower courts are in conflict on whether mass transit is a traditional function. The court below, and the Court of Appeals for the First Circuit,[3] have ruled mass transit *is* a traditional governmental function. The Third, Sixth and Eleventh Circuits have ruled it is not.[4]

---

[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] The opinion below is *San Antonio Metropolitan Transit Authority, et. al.* v. *Donovan, et. al.*, 557 F. Supp. 445 (D.C.W.D. Tex., 1983).

[3] *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982).

[4] *Kramer* v. *New Castle Area Trans. Auth.*, 677 F.2d 308 (3rd Cir. 1982), cert. den. — U.S. ——, 103 S.Ct. 786 (1983); *Dove* v. *Chattanooga Area Regional Trans. Auth.*, 701 F.2d 50 (6th Cir. 1983); *Alewine* v. *City Council of Augusta, Ga.*, and *Joiner* v. *City of Macon*, 699 F.2d 1060 (11th Cir. 1983).

Two of the conflicting cases are presently pending in this Court. They are the present case, in which Jurisdictional Statements have been filed on direct appeal, and *City of Macon* v. *Joiner*, No. 82-1974, O.T. 1982, in which the petitioner seeks a writ of certiorari directed to the Eleventh Circuit.

2. The court below issued a wide-ranging opinion on whether mass transit is a "traditional" governmental function. It found that "[t]he historical reality of mass transit reveals a long record of state concern and activity in the field." 557 F.Supp. at 448. Prior to today's predominantly public ownership of mass transit, this governmental concern had been expressed through state and city "regulation of fares, routes, schedules, franchising, and safety." *Ibid.* The private ownership previously existing under this regulation, ruled the court, did not negate the fact that today's publicly-owned mass transit systems are a governmental function. *Id.* at 448, 450. The court felt a contrary holding would represent the " 'static historical view of state functions' " eschewed by this Court in *United Transportation Union* v. *Long Island Railroad Co.*, 455 U.S. 678, 102 S.Ct. 1349 (1982). *Id.* at 450.

In a section of its opinion dealing with an extensive list of federal statutes, the court held that federal regulatory authority would not be eroded by ruling mass transit to be a governmental function. *Id.* at 448-50. The court pointed out that the statutes are inapplicable anyway (often because of exemptions), are only of recent vintage, or, like clean air laws, will continue to govern.

The court also looked at other relevant factors in determining whether publicly-owned mass transit is a traditional governmental function. It noted that the states and Congress have both recognized that public transportation is an essential state function, *id.* at 451, and it quoted numerous legislative statements showing this congressional view. *Ibid.* It also found that it is "extremely

difficult" to distinguish mass transit from activities this Court has ruled to be traditional governmental functions, *ibid.*, activities such as police protection, fire protection, schools, public health, parks and recreation. In this regard, the court noted that while Congress has made money available to local governments for mass transit, it has also made huge annual amounts available for the other activities. *Id.* at 452. The latter amounts range from hundreds of millions of dollars per year to many billions of dollars per year. *Ibid.*

Finally, the court pointed out that in urban areas mass transit is pervasively supplied by government, which provides it "over 90 percent of the time" when measured by vehicle miles and passenger trips, and "[i]n 230 of . . . 279 urban areas." *Id.* at 453. As well, the court ruled mass transit "benefits the community as a whole," cannot be provided at a profit, is in fact provided at a 75 percent operating loss which is primarily subsidized by state and local taxes, and, in the absence of profit, can only be provided by government. *Ibid.*

REASONS FOR GRANTING A PLENARY HEARING

1. This litigation is one of the two currently pending cases that present this Court with the question whether publicly-owned and operated mass transit systems are a "traditional governmental function." The other pending case is *City of Macon* v. *Joiner*, No. 82-1974, O.T. 1982. In their brief in support of *certiorari* in *Macon*, *amici* have set forth the reasons why this Court should grant a plenary hearing in the two proceedings. Thus, those reasons will only be summarized here. For a more extensive treatment of them, *amici* respectfully refer the Court to their brief in *Macon*, which can be read in conjunction with this brief.

In summary, the reasons for a plenary hearing are these:

A. The cases present the highly important issue of whether an activity now predominantly conducted by local governments is precluded from being a protected governmental function because it formerly was conducted by private enterprise. If an activity *is* so precluded, then governmental activities essential to the welfare of millions of citizens will be completely foreclosed from Tenth Amendment immunity against federal regulation. The power of state and local governments to effectively meet the needs of their citizens will be hindered, and the costs encountered by these governments will rise.

B. State and local governments are not static. They change their activities as required by the needs of citizens. In recent decades they have increasingly found it necessary to provide their citizens with a wide range of essential services, including airports, waste disposal facilities, hospitals, nursing homes, utility services, and other necessities of life. State and local governments need to know the circumstances in which their activities will be "traditional governmental functions" eligible for Tenth Amendment immunity. Lower courts have not provided the necessary guidance, and a clarifying decision from this Court is required.

C. There is a direct conflict among the lower courts on whether mass transit is a "traditional governmental function." The conflict exists among the circuits and between circuit court decisions and the opinion below.

D. The decisions holding mass transit is not a protected governmental function are inconsistent with this Court's decision in *United Transportation Union* v. *Long Island R.R.*, *supra*. This is true both as a factual matter and a legal one. As a factual matter, the commuter railroad services at issue in *Long Island R.R.* were overwhelmingly provided by privately-owned systems, whereas mass transit is overwhelmingly provided by publicly-owned systems. As a legal matter, the decisions holding mass transit is not a "traditional" governmental function have imposed precisely the "static historical view" of state

functions that was explicitly eschewed by this Court in *Long Island R.R.*, 445 U.S. at 686, 102 S.Ct. at 1357.

2. Nothing presented by appellants in this case alters the need for plenary hearing and decision by this Court. Appellants essentially make two arguments not covered in *amici's* brief in *Macon*. They argue, first, that mass transit is not a traditional governmental function because Congress provided some of the money used by local governments in acquiring and operating mass transit systems. Second, they assert that federal regulatory authority would be eroded by holding mass transit to be a traditional governmental function. This alleged erosion is particularly inappropriate, they say, because federal grant monies helped finance local governments' purchase of transit systems.

Neither of these additional arguments provides warrant for holding that mass transit is unprotected by the Tenth Amendment:

A. That Congress provided grants that were used in purchasing and operating mass transit does not prevent publicly-owned mass transit systems from being a protected governmental function. Rather, the congressional grants to local governments illustrate the national legislature's own recognition that it is essential for these governments to provide a vital service indispensable to the daily welfare of millions of their citizens.[5]

---

[5] The legislative record of congressional enactments dealing with mass transit contains numerous statements that mass transit is vital to today's society. These statements appear in statutory declarations of policy, in committee hearings and reports, and on the floor of Congress. See, e.g., 49 U.S.C. §§ 1601b(2), 1601b(4), 1601b(5), 1601b(7); H.Rep. No. 204, 88th Cong., 2d Sess., 1964-2 U.S. Code Cong. and Admin. News, pp. 2571, 2572, 2573; see also the congressional statements quoted in the opinion below, 557 F.Supp. at 451.

Furthermore, in its *Jurisdictional Statement* the government properly concedes that by 1964 Congress "had concluded that mass transportation needs have out-stripped the present resources of cities and States," and that a "nationwide program" would "assist

Appellants' argument would vitiate federalism, a result wholly inconsistent with this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Because the federal government's ability to tax and otherwise raise money is vastly superior to that of state and local governments, Congress has felt it necessary to grant the latter scores of billions of dollars annually to enable them to carry out vital activities.[6] These activities preeminently include ones this Court has held to be traditional governmental functions protected by the Tenth Amendment. As the court below pointed out, in 1979 alone the federal government granted state and local governments almost six billion dollars for education, over fourteen billion dollars for health, more than three and one-half billion dollars for sewage plants, and over one-half billion dollars for the administration of justice. If the use of grant funds were a criterion for assessing whether an activity is a traditional governmental function, these activities could not be protected under the Tenth Amendment, a result directly at odds with *National League of Cities* v. *Usery*, *supra*. As well, Congress' superior ability to tax and otherwise raise money would be converted into an instrument for injuring federalism by precluding state and local governments from receiving immunity for local activities that are plainly their responsibility.

These untoward consequences are not changed by the federal government's strained argument that mass transit is different from other activities because grant funds were used not only in the *operation* of publicly-owned transit systems, but in *acquiring and constructing* gov-

---

in solving transportation problems." *Jurisdictional Statement of Appellant Donovan*, p. 18, quoting H.Rep. No. 204, 88th Cong., 1st Sess. 4 (1963).

[6] It has been estimated that the federal government granted 82.9 billion dollars to state and local governments in 1980. Madden, the *Constitutional and Legal Foundation of Federal Grants*, in *Federal Grant Law* (American Bar Association, 1982), at p. 6, n.3.

ernmentally-owned transit facilities. The fact is that federal grant funds have been used extensively to acquire and construct governmentally-owned facilities for many activities that are protected governmental functions. Beyond this, there is no meaningful distinction for Tenth Amendment purposes between the use of grant funds in acquiring necessary facilities and their use in conducting necessary daily operations. Funds for the adequate daily operation of an activity are as essential to state and local governments as funds for acquiring the requisite capital facilities. A lack of sufficient funds for either purpose would greatly hinder the ability of state and local governments to carry out vital functions.

B. The appellants' argument concerning alleged erosion of federal regulation is no sounder than their argument on grant monies. For as shown by the court below, specific regulation of mass transit has chiefly been regulation by state and local governments, not regulation by the federal government. It has been state and local governments that have regulated entry into the business, fares, routes, schedules and safety.[7]

But even were federal regulation lessened by holding mass transit to be a traditional governmental function, a contrary holding would still be unjustified. Federal regulation is preeminently regulation of private parties, and this Court has made clear that federal regulatory authority can be exercised over private companies where it cannot be exercised over state and local governments. *Hodel* v. *Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 286-287, 101 S.Ct. 2352, 2365 (1981); *National League of Cities* v. *Usery, supra*, 426 U.S. at 845, 855-856, 101 S.Ct. at 2471, 2475-2476 (1976). Thus, that the federal government has regulated private parties who owned mass transit systems does not justify it in

---

[7] As said before, the lower court also pointed out that federal laws that could affect mass transit are inapplicable anyway, are only of recent origin, or—as in the case of generalized environmental and other laws that affect a host of activities besides transit—will continue to govern.

regulating local governments when *they* have now become the overwhelmingly predominant supplier of transit services (and have done so to fulfill their governmental responsibility to accommodate vital needs of citizens whom the private parties could no longer serve). Correlatively, a lessening of federal regulation if mass transit is ruled to be a protected governmental function does not justify an opposite ruling.

Nor is any of this changed because federal grants were used by local governments in acquiring transit facilities. For as said earlier, if the use of grant monies made a difference, then grants would gravely harm federalism by precluding Tenth Amendment immunity for local activities that have to be conducted by state and local governments.

CONCLUSION

For the foregoing reasons, this Court should order a plenary hearing in this case and, upon such hearing, should affirm the decision below.[8]

Respectfully submitted,

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---

[8] As indicated in *amici's* brief in *Macon*, p. 15, a plenary hearing is desirable both in that case and this one. For each case presents certain differing facets of the same problem. Thus *Macon* contains judicial findings showing that an overwhelming percentage of the citizens who use mass transit are dependent upon it, while in the instant case the publicly-owned transit system received UMTA funds from the federal government.

If a plenary hearing is granted in only one of the two cases, the other should be retained on the docket pending the Court's plenary decision.

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Nos. 82-1951 and 82-1913

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OCTOBER TERM, 1982

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SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
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On Appeals From The United States District Court For The Western District Of Texas

40pp.

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976 & Supp. V 1981) ("FLSA") to the operations of San Antonio Metropolitan Transit Authority because it is performing a traditional governmental function?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?

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Appellee San Antonio Metropolitan Transit Authority ("SAMTA"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the judgment is plainly correct under controlling Supreme Court decisions.

STATEMENT

This is a direct appeal from a final judgment entered on February 18, 1983, holding that the minimum wage and overtime provisions of the FLSA cannot be constitutionally applied to SAMTA and to local public mass transit systems in the United States. SAMTA does not challenge the jurisdiction of this Court under 28 U.S.C. § 1252 (1976).

An Historical Overview Of The FLSA, As Applied To The States

The FLSA, as originally enacted in 1938, prescribed minimum wage and overtime compensation requirements for employees engaged in commerce or the production of goods for commerce. Specifically excluded were states and their political subdivisions as well as employees of "street, suburban, or interurban electric railway[s], or local trolley or motorbus carrier[s]." Pub. L. No. 75-718, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067 (1938).

In 1961, the FLSA was amended to extend minimum wage coverage to employees of private electric railways and trolley and motorbus carriers having gross revenues of one million dollars or more; an overtime exemption for all such employees was simultaneously enacted. Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). The exemption from both the minimum wage and overtime provisions was continued for all employees of such entities having gross revenues of less than one million dollars. *Id.* § 9. The exemption for public employers remained unchanged.

In 1966, the FLSA was amended to cover states or their political subdivisions with respect to schools, hospitals, and

related institutions, and "street, suburban or interurban electric railway[s], or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency. . . ." Pub. L. No. 89-601, §§ 102(a) & 102(b), 80 Stat. 830, 831 (1966). The threshold level for coverage was reduced to $250,000, and the overtime exemption was changed to cover operators, drivers and conductors. *Id.* §§ 102(c), 206(c). In 1968, the amendment extending coverage to public schools and hospitals was held constitutional. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, the FLSA was amended to reach all state and local government employees and, in stages, to repeal the overtime exemption for drivers, operators and conductors effective May 1, 1976. Pub. L. No. 93-259, §§ 6(a)(1), 6(a)(6) & 21(b)(1), 88 Stat. 55, 58, 60, 68 (1974). The constitutionality of the amendments applying the FLSA to state and local government employees was challenged in a landmark case in which this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl 3." *National League*, 426 U.S. at 852. The Court did not identify all state activities that are constitutionally protected, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. In overruling *Maryland* v. *Wirtz*, the Court also extended constitutional immunity to schools and hospitals. 426 U.S. at 855. The only activity identified as not being immune was a state-operated railroad. *Id.* at 854 n.18. Public transit was not mentioned.

On remand, the three-judge court recognized that this Court's decision did not provide an exhaustive list of exempt activities and left a gray area for future resolution. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). The court expressed concern over potential monetary liability of government employers in this gray area, and in response, the Secretary of Labor issued regulations (29

C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator is to determine those operations against which he will seek to enforce the FLSA and to publish those determinations as amendments to section 775.3(b).

The Proceedings In This Case

By letter dated September 17, 1979, to the Amalgamated Transit Union, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System [SAMTA's municipally-owned predecessor] . . . are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in *National League* . . . ." On November 21, 1979, SAMTA filed this action for a declaratory judgment that the minimum wage and overtime provisions of the FLSA are inapplicable to its operations. SAMTA's operators then brought a separate action for alleged unpaid overtime and liquidated damages. The employees' action was stayed pending disposition of the constitutional issue in this suit. The Secretary of Labor counterclaimed against SAMTA for back-pay and injunctive relief, and the American Public Transit Association ("APTA") and Joe G. Garcia, one of SAMTA's employees, were permitted to intervene.

On November 17, 1981, the district court held that local public mass transit systems constitute integral operations in areas of traditional governmental functions under *National League* and entered summary judgment in favor of SAMTA and APTA. Gov't Jurisdictional Statement App. C. A direct appeal was taken to this Court, which vacated the district court's decision and remanded for "further consideration"[1] in light of its intervening decision in *United Transportation Union* v. *Long Island Rail Road*, 455 U.S. 678 (1982) ("LIRR"). *Donovan* v. *San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

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[1] In his jurisdictional statement (pp. 5, 6), Garcia incorrectly states that this case was remanded for "reconsideration" in light of *LIRR*.

On February 18, 1983, the district court rendered its decision on remand and reentered summary judgment in favor of SAMTA and APTA.[2] The court articulated the question before it as "whether public transit is one of 'the *numerous* line and support activities which are well within the area of traditional operations of state and local governments.' " Gov't App. 3a (emphasis in original). The court found that the "record of state regulatory activity indicates that mass transit has traditionally been a state prerogative and responsibility, not a federal concern," and that "[u]nlike the railroad in *LIRR*, . . . neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity." Gov't App. 6a, 7a. The court also concluded that "[t]he states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the [*National League of Cities* v.] *Usery* functions," and that "Congress [has] recognized the similarities between public transit and the *Usery* functions." Gov't App. 12a, 13a. The court rejected the contention that partial federal funding of public transit defeats *National League* immunity because the federal funding statute for transit "is an exercise of the Congressional Spending Power," "federal funding supports each of the *Usery* functions," and "the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity." Gov't App. 14a, 16a.

The district court also rejected the "[p]ervasiveness of government performance of a function" and a "function's ori-

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[2] The district court first issued its decision on February 14, 1983, but subsequently withdrew it and substituted the memorandum opinion that is the subject of this appeal. A copy of the district court's decision (*San Antonio Metropolitan Transit Authority* v. *Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983)) has been reproduced as Appendix A to the Government's jurisdictional statement and is cited in this motion as "Gov't App." Garcia's jurisdictional statement, although reciting that the district court's opinion is reproduced as Appendix A, instead has reproduced the court's withdrawn February 14 opinion.

gins in the private sector" as bases for distinguishing transit from the functions exempted by this Court in *National League* and cited statistics showing that governmentally owned hospitals, which this Court specifically exempted in *National League*, would not be exempt under such a test. Gov't App. 16a, 17a. Finally, the court concluded that transit satisfies the four immunizing factors set out in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979): transit "benefits the community as a whole"; it "is provided at a heavily subsidized price"; transit "services cannot be provided at a profit"; and "government is today the primary provider of transit services." Gov't App. 18a, 19a.[3]

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[3] Four federal appellate courts have considered the question whether public transit is constitutionally exempt from the FLSA. In *Molina-Estrada* v. *Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982), the court held that a highway authority which had the power to operate a mass transportation system (and intended to build one) and which operated parking lots and charged a fee for the use of its highways, was exempt under *National League* because these activities, among others, were "sufficient to indicate that the Authority is responsible for 'traditional' or 'integral' governmental activities." *Id.* at 845. Relying upon *Amersbach*, the court could find "no meaningful distinction between the Authority's activities, and those, for example, of a municipal airport, . . . or the parks, recreation and public health activities mentioned in *National League of Cities* itself." 680 F.2d at 846. *National League* immunity was denied by the courts in *Alewine* v. *City Council of Augusta, Ga.*, 699 F.2d 1060 (11th Cir. 1983), *petition for cert. filed sub nom. City of Macon* v. *Joiner*, 51 U.S.L.W. 3884 (U.S. June 6, 1983) (No. 82-1974) and *Kramer* v. *New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983), and summary judgment on this issue was reversed in *Dove* v. *Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983). *Alewine* and *Kramer* were based on an historical approach, which was eschewed by this Court in *LIRR*, and on federal funding under the Urban Mass Transportation Act, *infra*, which was foreclosed by this Court's unanimous decision in *Jackson Transit Auth.* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982). *Dove* relied in large part on this Court's denial of certiorari in *Kramer* and federal funding of transit.

Facts About Public Transit In San Antonio[4]

Publicly owned transit has existed in San Antonio since 1959, when the City of San Antonio acquired the San Antonio Transit Company and began providing transit as a municipal service through the newly created San Antonio Transit System ("SATS"). The City's purchase was financed by revenue bonds, and no federal funds were involved in the acquisition.

In 1973, the Texas Legislature enacted article 1118x, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1982-1983), which authorizes the establishment of metropolitan rapid transit authorities and provides that they constitute "public bod[ies] corporate and politic, exercising public and essential governmental functions . . . ." *Id.* § 6(a).[5]

SAMTA was created under article 1118x by the City Council of San Antonio on February 3, 1977. An election was held on November 8, 1977 among "the qualified voters within the authority" (*id.* § 5(d)), confirming SAMTA's creation and authorizing SAMTA to levy a one-half percent sales tax. SAMTA then purchased the facilities and equipment of SATS from the City of San Antonio and commenced operations on March 1, 1978. SAMTA funded the purchase through bonds secured by its revenues and certain property. No federal funds were used in the purchase.

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[4] Unless another citation is given, the facts are taken from the affidavit of Wayne Cook, which is part of the record below.

[5] Under article 1118x, an authority can, among other things, exercise the right of eminent domain; establish and maintain fares subject to approval by a local government approval committee; make all rules and regulations governing the use, operation and maintenance of the system; issue bonds and notes; levy and cause to be collected motor vehicle emission taxes; levy, collect and impose a local sales and use tax subject to a local election; and levy and collect any kind of tax other than an ad valorem tax on property which is not prohibited by the Texas constitution. *Id.* §§ 6, 6E, 7, 8, 11A, 11B. An authority *must* provide service to incorporated cities and unincorporated areas adjacent to its service area if the electorate of such adjacent city or area votes for annexation into the authority. *Id.* § 6A.

During its first two fiscal years, SAMTA's regularly scheduled line-service buses carried approximately 63.4 million passengers over more than 26.5 million bus miles. Of these passengers, approximately 5.3 million were senior citizens, 1.5 million were handicapped persons and 14.6 million were elementary, junior high, high school and college students, and children under 12. Approximately 3.3 million other student passengers were transported to and from school by SAMTA on nonline school bus service pursuant to arrangements with two Bexar County school districts. It is estimated that at least two-thirds of all passengers riding SAMTA's regular line-service buses are travelling to or from school or their jobs. SAMTA also serves the needs of the elderly and handicapped through a fleet of lift-equipped vans.

SAMTA is operated almost entirely with local sales taxes, federal funds and fare box receipts. Fares charged to passengers are nominal, ranging (when this case was first briefed below) from no charge for the smaller El Centro buses that circulate through the downtown area, up to 60¢ per ride for the longest runs, with children, the elderly and the handicapped paying 10¢. The average fare was 18¢. For SAMTA's first two fiscal years, total revenues from line-service fares were about $10.1 million, compared to operating expenses for such services of about $41.6 million.[6] SAMTA had an operational deficit of about $31.5 million, which was satisfied from sales taxes totalling approximately $26.8 million, operational grants of approximately $12.5 million from the Urban Mass Transportation Administration, and other operational revenues of approximately $.7 million.

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[6] Fares thus constituted less than 25% of SAMTA's operating expenses for its first two fiscal years. In comparison, user charges as a percent of total costs in 1976-77 in the nation's 48 largest cities for other activities exempted by *National League* were 38% for sewage, 34% for hospitals and 27% for institutions of higher education. Institute of Pub. Admin., *Financing Transit: Alternatives for Local Government*, 228 tab. 10-2 (1979, prepared for the U.S. Dep't of Transp.).

ARGUMENT

I. TRANSIT IS A TRADITIONAL FUNCTION

In *National League*, this Court held that the States' power to determine their employees' wages, hours and overtime compensation is an "undoubted attribute of state sovereignty." 426 U.S. at 845. It identified the question before it as whether determinations of wages, hours and overtime "are 'functions essential to [the States'] separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. The Court discussed the effect the FLSA amendments would have on fire and police protection, but, noting disagreement among the parties as to the "precise effect the amendments will have in application," concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented . . . ." *Id.* at 851.[7] The Court then held that "application [of the FLSA amendments] will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships" in activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* The Court observed that "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' " *Id.*[8]

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[7] This was reaffirmed in *EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1063 (1983).

[8] The Government's jurisdictional statement (p. 21; see also pp. 10, 25) contends that for public transit to be exempt under *National League*, it must be "an essential aspect of the states '*separate* and *independent* existence.' " In making this argument, the Government has misread *National League*, which posited the question before it as follows:

> One undoubted attribute of state sovereignty is the States' *power to determine* the *wages* which shall be paid to those whom they employ in order to carry out their governmental functions, what *hours* those

After *National League*, the only task remaining for the courts in FLSA cases is to complete the "catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16. Thus the issue before the Court is whether SAMTA (and local public mass transit generally) is one of these traditional functions. Transit is not materially different from the other activities exempted in *National League*, and the

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> persons will work, and what *compensation* will be provided where these employees may be called upon to work overtime. *The question we must resolve* here, then, *is whether these determinations are " 'functions essential to separate and independent existence,' "* [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them.

426 U.S. at 845-46 (emphasis added).

In answering this question in favor of the States, the Court established the principle that the power of the States to make wage and hour determinations *is* a function essential to their separate and independent existence and that Congress cannot regulate the States' prerogatives in this area when an integral or traditional activity of government is involved. The "separate and independent existence" test referred to by the Government has nothing to do with the determination whether an activity is traditional, but rather goes to the question whether the particular federal regulatory scheme itself unconstitutionally impairs state prerogatives that are essential to separate and independent existence—such as, in *National League*, the prerogative to prescribe wages and hours; in *LIRR*, the power to regulate railroad labor relations; and, in *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), the right to discriminate on the basis of age. *National League* has already determined that the FLSA's interference with the States' right to set the wages and hours of public employees "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," *EEOC* v. *Wyoming*, 103 S. Ct. at 1062, thereby endangering the States' separate and independent existence, and that issue accordingly is not present in this case. The validity of SAMTA's position in this regard is underscored by the fact that parks and recreation (which *National League* listed as traditional) could not be exempt under the Government's erroneous formulation; nor could hospitals and refuse collection (sanitation) in view of the substantial private sector involvement in those activities. Similarly, libraries and museums, which the Secretary of Labor has exempted by regulation (29 C.F.R. § 775.4), would not meet the test for immunity asserted by the Government in this case.

district court's decision finding transit to be exempt is entirely consistent with *National League* as well as the Court's unanimous decisions in *LIRR* and *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

A. Transit Satisfies The Tests For *National League* Immunity Articulated In *United Transportation Union* v. *Long Island Rail Road*, 455 U.S. 678 (1982).

In *LIRR*, the Court held that the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), can be constitutionally applied to a "[state-owned] railroad engaged in interstate commerce," but acknowledged that "under *most* circumstances federal power to regulate commerce [cannot] be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 685, 686 (emphasis added). Although *LIRR* involved a different statute raising different considerations from the FLSA, the factors upon which the Court's decision turned support the decision below.

In *LIRR*, the Court focused upon four crucial attributes of railroads, which do not exist in the case of local transit: (1) railroads are part of a national rail network requiring uniform federal regulation; (2) railroads have been subject to comprehensive, long-standing federal regulation; (3) railroads have no comparable history of state regulation; and (4) the railroad in *LIRR* was only one of two state-owned passenger railroads in the United States. The Court also emphasized that the Long Island Railroad voluntarily operated for years under the Railway Labor Act without any claim of disruption. The facts and authorities which follow demonstrate that each of these elements is inapplicable to SAMTA.

1. Transit Is Not Part Of A National Transportation Network.

In *LIRR*, the Court emphasized the interstate nature of railroads and their role as a component part of the national rail system. Thus, the Court noted that the Long Island Railroad "connects with lines of railroads which serve other parts of the

country [,] . . . supplies Long Island's only freight service [and] does a significant volume of freight business." 455 U.S. at 680 n.1. The Court concluded:

> [T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. Congress determined that the most effective means of preventing such disruptions is by way of requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees.
>
> . . . To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

Id. at 688-89.

In contrast, SAMTA provides a purely local service. It serves only Bexar County in which two-thirds of its passengers are going to or from work or school. During its first two fiscal years, approximately twenty percent of its local line-service passengers were students or children, and another 3.3 million students were carried on nonline service under arrangements with school districts.[9] SAMTA also serves Bexar County hospitals and provides mini-bus service in the downtown area.

Unlike the railroad industry, there is no national transit system; nor has Congress ever concluded that "uniformity" in transit is essential. In fact, the contrary is evident from the Administration's plan to eliminate transit operating subsidies:

> Primary responsibility for mass transit should remain with State and local governments. *Decisions about* serv-

[9] In this respect, SAMTA is engaged in an activity integral to education.

> ice levels, equipment and facilities, fares, *wage rates* and management practices *are better left to local decision-makers*. Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions.

Major Themes & Additional Budget Details Fiscal Year 1983 at 121 (Executive Office of the President, Office of Mgmt. & Budget 1982) (emphasis added); *see also Major Themes & Additional Budget Details Fiscal Year 1984* at 81-82 (Executive Office of the President, Office of Mgmt. & Budget 1983).

Any disruption of a transit system is a purely local problem which, unlike an interstate railroad, has no impact on other transit systems serving other localities around the nation.

The Government's reference in its jurisdictional statement (pp. 18, 19) to the Urban Mass Transportation Act's (49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) ["UMTA"]) characterization of the decline of transit services as a problem requiring a "nationwide program" and the Government's portrayal of public transit as a "venture in 'cooperative federalism' " between the States and federal government does not enhance its position one whit since Congress has made the same observations about virtually all of the other activities exempted by *National League*.[10] Examples are:

Health and Hospitals: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.* (1976 & Supp. V 1981), establishes a "joint

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[10] For the same reasons, the Government's reliance (jurisdictional statement p. 20 n.24) on the fact that some transit systems are "areawide" or "operate across state lines" is also misplaced. *E.g.*, S. Rep. No. 96-96, 96th Cong., 1st Sess. 33-34, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1306, 1338-39 (of 205 health service areas, 15 are interstate, one is tristate and 13 encompass interstate SMSA's); S. Rep. No. 11, 88th Cong., 1st Sess. 5, *reprinted in* 1963 U.S. Code Cong. & Ad. News 664, 667 (Secretary of Interior should "encourage interstate and regional cooperation in the planning, acquisition, and development of outdoor recreation resources"); *History of Public Works in the United States 1776-1976* at 416, 418 (American Public Works Ass'n 1976 [referred to herein as "*History of Public Works*"]) ("[i]nterstate compacts have offered a more effective means of promoting regional water pollution control" . . . the 1948 Water Pollution Control Act (Pub. L. No. 80-845, 62 Stat. 1155 (1948)) provided for "interstate cooper-

Federal-State system for assuring compliance with these standards" (H.R. Rep. No. 93-1185, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6454, 6455). National Health Planning & Resources Development Act of 1974, 42 U.S.C. § 300k, *et seq.* (1976 & Supp. V 1981) will "assure the development of a national health policy"; Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946) (current version at 42 U.S.C. § 291, *et seq.* (1976 & Supp. V 1981)), providing for hospital construction, was a "Federal-State partnership"; "national guidelines" for health planning are needed; it is the "responsibility of the Federal government to intervene" to upgrade large urban hospitals (S. Rep. No. 93-1285, 93d Cong., 2d Sess. 1, 19, 42, 59, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7859, 7882, 7898).

Sanitation: Solid Waste Disposal Act, Pub. L. No. 89-272, Title II, 79 Stat. 997 (1965), requires that "immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem"; "[t]he problem of solid waste disposal is all-pervasive and has become national in scope . . . [and] will require the combined resources of the Federal, State, and local governments as well as industry and research institutions" (H.R. Rep. No. 899, 89th Cong., 1st Sess. 7, 22, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3614, 3627). "[P]roblems of waste disposal . . . have become a matter national in scope" (Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (Supp. V 1981)).

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ation"); H.R. Rep. No. 899, 89th Cong., 1st Sess. 8, 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3615, 3634 (federal financial assistance is needed to encourage and help the states and interstate agencies undertake surveys of solid waste and develop plans on a "statewide or interstate basis" . . . "interstate and interlocal cooperation" is needed); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288(a)(3) (1976) (providing for "areawide waste treatment management plans" for multistate areas); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6946(c) (1976) (providing for "interstate [solid waste disposal] regions"); Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197, 200 (1973) (amended 1979) (providing for "interstate metropolitan regional planning units").

Education: The "purpose" of the Elementary & Secondary Education Act of 1965, 20 U.S.C. § 236, *et seq.* (1976 & Supp. V 1981) "is to meet a national problem" (S. Rep. No. 146, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1449).

Fire: "Fire is a major national problem" (S. Rep. No. 93-470, 93d Cong., 1st Sess. 6, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6191, 6196). The federal government is a "partner in attaining" the goal of improving the quality of local fire service delivery (Advisory Comm'n on Intergovernmental Relations, *The Federal Role in Local Fire Protection* 18 (1980)).

Police: "Crime is a national catastrophe"; "[t]here are certain national objectives which are vital to every citizen of this country, and the elimination of crimes is one of the foremost among these objectives" (S. Rep. No. 1097, 90th Cong., 2d Sess. 31, 179, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2117, 2239). The role of the Law Enforcement Assistance Administration is a "partner with State and local governments" (S. Rep. No. 91-1253, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5804, 5805).

Each of these "national" problems has received congressional attention and support. Yet, each is exempt from FLSA coverage.

2. Transit Has Not Been Subject To Comprehensive And Long-Standing Federal Regulation.

In *LIRR*, the Court relied heavily on the fact that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." 455 U.S. at 687. The Court concluded that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas *traditionally subject to federal statutory regulation.*" *Id.* (emphasis added).

Unlike the "national rail system," *LIRR*, 455 U.S. at 688, federal regulation of transit has been no greater than that governing the activities specifically exempted by *National*

League. There is no scheme of federal regulation designed to provide uniformity among transit systems, as in the case of railroads, which are subject to an array of industry-specific federal laws.

The Government's argument (jurisdictional statement pp. 22-26) that the federal government has adopted comprehensive, long-standing regulation of transit finds no support in the federal statutes it cites.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), and therefore the Labor-Management Reporting & Disclosure Act, 29 U.S.C. § 401, *et seq.* (1976 & Supp. V 1981) (see definition of "employer," *id.* § 402(e)), apply to the activities specifically exempted in *National League* when performed by private sector employers. *E.g.*, *Crestline Memorial Hospital Association, Inc.* v. *NLRB*, 668 F.2d 243 (6th Cir. 1982); *Florence Volunteer Fire Department, Inc.*, 265 NLRB No. 134 (1982); *Champlain Security Services, Inc.*, 243 NLRB 755 (1979); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977); *Tulane University*, 195 NLRB 329 (1972); *Oakland Scavenger Corp.*, 98 NLRB 1318 (1952). A law of general application that regulates virtually every private employer in the country, including those activities (*e.g.*, hospitals, schools and sanitation) exempted in *National League* that have substantial private sector involvement, cannot be equated with the comprehensive federal statutes specifically regulating railroads. In fact, in view of the almost universal applicability of the NLRA to employers in the United States, the Government's argument would impose the "static historical view of state functions" shunned by this Court in *LIRR*, 455 U.S. at 686, since any new activity undertaken by a state—no matter how necessary or important—would be denied Tenth Amendment protection if it was previously performed to any degree by the private sector.[11] Furthermore, as

[11] The all-encompassing breadth of the NLRA is evident from the fact that it applies even to the local activities of charitable and beneficent organizations. *E.g.*, *Cincinnati Ass'n for the Blind* v. *NLRB*, 672 F.2d 567 (6th Cir.), *cert. denied*, 103 S. Ct. 78 (1982) (sheltered workshop for blind workers);

noted by the district court (Gov't App. 9a), the NLRA "contains an exemption for state and local governments." It would indeed be an anomaly to deny Tenth Amendment protection to the States based upon a statute that Congress specifically decreed shall not apply to the States.

The Government also relies on the fact that the Equal Pay Act (29 U.S.C. § 206(d) (1976)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1976 & Supp. V 1981)) apply to transit. This logic is circular because those same statutes apply to public employers providing activities exempted by *National League*. *E.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's application to the States); *Pearce* v. *Wichita County Hospital Board*, 590 F.2d 128 (5th Cir. 1979) (applying Equal Pay Act to a public hospital).

The Government's reliance on the 1961 and 1966 FLSA amendments is misplaced. Private transit systems were by statute exempt before 1961, and therefore during the first twenty-three years of its existence, the FLSA was totally inapplicable to transit. The 1961 amendments extended the FLSA only to private systems with revenues exceeding one million dollars, but even then exempted all employees from the overtime requirements. Even the 1966 amendments continued the overtime exemption for operators. It was not until 1976 that even private transit was brought fully under the FLSA's overtime requirements, but this was pursuant to the 1974 amendments, whose constitutionality is challenged in this very action, and which accordingly cannot provide bootstrap sup-

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NLRB v. *Southeast Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428 (9th Cir. 1982) (nonprofit organization that trains the handicapped); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (church-operated center for battered, abused and neglected children); *Rhode Island Catholic Orphan Asylum*, 224 NLRB 1344 (1976); *Salvation Army*, 225 NLRB 406 (1976); *Boys & Girls Aid Society of San Diego*, 224 NLRB 1614 (1976) (nonprofit residential treatment for emotionally disturbed children); *Children's Village, Inc.*, 186 NLRB 953 (1970) (nonprofit home for delinquent children).

port for the Government's position. The vast majority[12] of private and public transit employees have been subject to the full play of the FLSA only since 1976, and this hardly constitutes long-standing or comprehensive federal regulation of wage and hour practices or any other aspect of transit operations.

3. There *Is* Long-Standing State Regulation Of Transit.

In holding the Long Island Railroad to be nontraditional, the Court also relied upon the fact that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry."[13] 455 U.S. at 688. The reverse is true of transit in Texas and San Antonio.

State and local regulation of transit in Texas dates back at least 70 years. In 1913, an enabling act was passed by the Texas legislature delegating to the cities exclusive control over their streets and highways, including the powers:

> To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to

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[12] During SAMTA's first fiscal year, operators' salaries and wages were approximately $6.62 million or about 69% of $9.6 million in total salaries or wages, which shows that the majority of SAMTA's employees are operators. Garcia's Appendix below at 62. *See also Amendments to the Fair Labor Standards Act: Hearings on S. 763, et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 89th Cong., 1st Sess. 314 (1965) (referred to herein as "*Hearings on S. 763*"), which shows that of 54,697 total transit employees, 38,597 (70%) were operating personnel.

[13] The Government's argument (jurisdictional statement pp. 16-17) that state regulation of transit is not an appropriate consideration thus improperly disregards an important element of the test for immunity articulated in *LIRR*.

> provide for the giving bond or other security for the operation of the same.
>
> To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire.
>
> . . .

1913 Tex. Gen. Laws, ch. 147, § 4, at 314, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175, §§ 20, 21 (Vernon 1963).

In 1915, the City of San Antonio passed a comprehensive ordinance to regulate all types of vehicles operated for hire to transport passengers. San Antonio, Tex., Ordinance OF1-1 (Mar. 8, 1915). The ordinance required owners of vehicles, including motor buses, to obtain a franchise from the city for transporting passengers for hire on city streets; established license application and fee specifications and insurance or bond requirements; and specified vehicle safety features such as lighting, speed and driver age and conduct. Another comprehensive ordinance was enacted in 1921, updating the 1915 ordinance and including a designated motor bus route and terminals. San Antonio, Tex., Ordinance OF-266 (Dec. 1, 1921).

The City continued to regulate fares, routes, schedules and franchises of private transit companies until 1959, when it created SATS and purchased the assets of SATS' predecessor pursuant to a state law authorizing cities to issue bonds for the purchase, construction or improvement of street transportation systems. Tex. Rev. Civ. Stat. Ann. art. 1118w (Vernon 1963 & Supp. 1982-1983). Public mass transit in San Antonio changed again after state legislation in 1973 authorized a change from a municipal to a metropolitan facility. Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Supp. 1982-1983). The history of transit in San Antonio, from a city-controlled private franchise, to a city-owned system in 1959 and to an autonomous metropolitan authority in 1978, illustrates the traditional role

of the city and state in providing and regulating efficient transportation for the convenience and welfare of local citizens.[14]

4. State And Local Government Are The Principal Providers Of Transit

In finding the Long Island Railroad not to be a traditional function of state government, this Court noted that only two of seventeen commuter railroads in the United States were public. One of those was the Long Island itself, which was converted from a "private stock corporation to a public benefit corporation" in 1980. 455 U.S. at 681. The other was the Staten Island, which became public in 1971. *Id.* at 686 n.12. *See also Employees of the Department of Public Health & Welfare* v. *Missouri Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973) (state-owned railroad in *Parden* v. *Terminal Railway Co.*, 377 U.S. 184 (1964) was "a rather isolated state activity").[15]

In *LIRR*, the Court stated that it was not imposing a "static historical view of state functions generally immune from feder-

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[14] Other Texas statutes regulating intracity bus systems are Tex. Rev. Civ. Stat. Ann. art. 1015 (Vernon 1963) (authorizing governing bodies of cities to license, tax and regulate omnibus drivers); art. 1181 (Vernon Supp. 1982-1983, *original version at* 1913 Tex. Gen. Laws, ch. 147, § 9, at 317) (confirming that cities have exclusive power to grant franchises for the use of public streets); art. 6663c (Vernon 1977 & Supp. 1982-1983) (authorizing state assistance to cities for establishment of mass transit systems); art. 6675a-2 (Vernon 1977) (providing for registration of motor vehicles); art. 6675a-5 (Vernon Supp. 1982-1983) (setting annual license fees for street and suburban buses); art. 6675a-13 (Vernon 1977) (establishing license plate requirements for motor vehicles required to be registered); art. 6687b, § 5 (Vernon 1977) (establishing requirements for drivers of motor vehicles used as school buses); art. 6698 (Vernon 1977) (authorizing incorporated towns to collect city permit fees on motor vehicles transporting passengers for hire).

[15] Commuter railroads are not even considered part of mass transit. "The urban transit industry includes all 'companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules' *except commuter railroads* and limousine service. . . ." Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. & Lab. Rel. Rev. 95 (1971) (emphasis added).

al regulation." 455 U.S. at 686.[16] The decision of the district court extending immunity to SAMTA and public mass transit applied the same principle.

Local transit in San Antonio has been publicly owned and operated since 1959. In 1979 all eighteen municipal transit systems in Texas operating five or more vehicles in scheduled, fixed route, intracity service were publicly owned or operated. *1979 Texas Transit Statistics* 1 (Tex. Dep't of Hwys. & Pub. Transp. 1980). Nationally, 94% of all transit riders use public mass transit. APTA, *Transit Fact Book 1981* at 27. The figures in the Government's jurisdictional statement (p. 14 n.17) showing that roughly half of the 686 transit systems in urban areas over 50,000 population are public is misleading since those 686 systems include the smallest, with only one bus, and the largest with over 2000 buses. The publication from which these figures are taken reflects that the principal provider of transit services in each of the 25 largest urban areas in the United States and in at least 100 of the 106 urban areas having populations exceeding 200,000 is public. *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service*

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[16] In its jurisdictional statement (p. 18), the Government contends that *LIRR* held that "historical evidence is of paramount importance." The quotation in the text from *LIRR* repudiates this contention and is in keeping with earlier Supreme Court pronouncements. *E.g., Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978) ("[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions"); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955) ("it is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed"); *Helvering* v. *Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("There cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental . . . . [T]he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires").

in Urbanized Areas Over 50,000 Population (Dep't of Transp. 1981) (referred to herein as "*DOT Directory*").[17]

It is also clear that the States regard transit "as [an] integral part[] of their governmental activities," which is another test for *National League* immunity. 426 U.S. at 854 n.18.[18] Article 1118x provides that metropolitan transit authorities are "essential governmental functions"[19] and are not "proprietary." *Id.* §§ 6(a), 13A. Article 6663c, § 1(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) provides that "public transportation is an essential component of the state's transportation system. . . ."

Perhaps most apposite to transit are the Court's observations in *Brush* v. *Commissioner of Internal Revenue*, 300 U.S.

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[17] The Government's attempt (jurisdictional statement p. 15) to equate public mass transportation with commuter railroads conflicts with the position it took in its amicus brief in *LIRR*. For example, on page 12 of that brief, the Government insisted that the Long Island Railroad "remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable from conventional intraurban transit systems.*" (emphasis added). The Government contended that this distinction "is firmly grounded in the separate histories of these two sectors of the transportation industry, in the applicable law, and in the usages of the industry," *id.* at 25 n.19, and contrasted the two public commuter railroads (out of seventeen) with the more than 1000 transit systems in the United States, "nearly half of [which], including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies." *Id.* at 27 n.20. The Government cited these statistics in support of its contention that "public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads." *Id.*

[18] As noted by the district court (Gov't App. 13a), the fact that public transit is an essential governmental activity, no different from the other activities exempted in *National League*, is evident from the legislative histories of the federal urban mass transit legislation, which equated transit with such essential public necessities as water, sanitation, police and fire protection, hospitals and education.

[19] Examples of "other state laws decreeing public mass transit to be an essential function of government" are cited in the district court's memorandum opinion. Gov't App. 12a n.7.

352 (1937), tracing the evolution of private water service into an essential function of government:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions. . . .
>
> We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as nonexistent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are nonetheless so because the use of them has had a recent beginning.

Id. at 370-71.[20]

Although public transit, like water service, was once largely a function of private enterprise, it has evolved into an essential function of state and local government, and this Court's conclusions are no less applicable to transit today than they were to water service forty-six years ago.[21] *See also Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) (extending FLSA immunity to a municipal airport and holding that the

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[20] The question in *Brush* was whether the salary of a city official was subject to federal income taxes. The Court concluded it was not, based upon its holding that the city was performing an essential governmental function in furnishing water to the public. Although the Court's ruling on the income tax question is no longer valid in view of subsequent decisions upholding federal taxation of local government officials even when they are performing sovereign governmental functions, the Court's comments, quoted in the text, remain timelessly valid.

[21] For this reason, *Helvering* v. *Powers*, 293 U.S. 214 (1934), relied upon by the Government (jurisdictional statement p. 17), is inapposite. *Powers* was written 49 years ago when public transportation was in its formative stage and mass transit as we know it today did not exist. Just as the provision of water passed from the private sector into an essential governmental service in *Brush*, transit has become a vital service provided almost ex-

"terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times").

5. SAMTA Has Never Acceded To FLSA Coverage.

In *LIRR*, the Court relied on the fact that the "State knew of and accepted" the Railway Labor Act and "operated under [it] for 13 years without claiming any impairment of its traditional sovereignty." 455 U.S. at 690. When the Long Island Railroad was sued for a declaratory judgment that the Railway Labor Act rather than the New York Taylor Law applied, its response "was to acknowledge that the Railway Labor Act applied." *Id.* Then, while the suit was pending, it converted to a public benefit corporation "apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law." *Id.* at 681.

Unlike the Long Island Railroad's acceptance of the Railway Labor Act, SAMTA has never accepted FLSA coverage of its operations. When the Deputy Wage and Hour Administrator issued his September 17, 1979 ruling that local transit is constitutionally within the FLSA, SAMTA promptly brought this action challenging the deputy administrator's ruling.

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clusively by the States as an "integral part[] of their governmental activities," *National League*, 426 U.S. at 854 n.18, and as a "service[] which their citizens require," *id.* at 847. The States provide transit as a matter of public necessity rather than by choice, and they clearly are not "running . . . a business enterprise" or conducting a "business activit[y] which [has] as [its] aim the production of revenues in excess of costs," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1, 424 (1978) (Burger, C. J., concurring). *See also Reeves, Inc.* v. *Stake*, 447 U.S. 429, 449-52 (1980) (Powell, J., dissenting) (noting distinction between the " 'State as government and the State as trader,' " *id.* at 450). To compare the street railway in *Powers* as it existed in 1934 with the modern taxpayer-subsidized transit services that urban residents demand as an indispensible governmental service is tantamount to comparing the automobile with the horse and buggy.

B. Transit Systems Are Analogous To Hospitals.

As noted by the district court, "[a]nalogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity." Gov't App. 11a. Although public transit has much in common with all of the other exempt activities, comparison with the hospital industry makes it clear beyond a peradventure that transit is exempt.

Public sector involvement in hospitals is not as well established as in the transit field. For example, in 1980, of this nation's 7,051 hospitals, only 2,562 (36%), including federal facilities, were under government control. *Statistical Abstract of the United States 1982-83* tab. 171, at 111 (U.S. Dep't of Commerce, Bureau of Census, 1982). By comparison, in 1981, 598 (58%) of the 1,025 transit systems of all sizes were owned by state or local governments.[2] As a further comparison, a 1965 Senate Hearing Report states that "[t]here are 79 cities in which the dominant transit system is publicly owned and operated . . . [whose] employees . . . represent approximately 56% of the total employees in the local transit industry." *Hearings on S. 763* at 309. Almost 10 years later, in 1974, "56% of all hospital employees" worked for "non-public hospitals." S. Rep. No. 93-766, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3948. Hospitals have their roots in the private sector, and to this day are primarily private:

> The hospitals established in the eighteenth and nineteenth centuries were constructed and run by proprietary groups and church and other nonprofit organizations. This form of ownership remains the predominant characteristic of United States medical facilities.

History of Public Works 490.

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[2] *DOT Directory* 19; U.S. Dep't of Transp., A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service 13 (1981).

Federal funding has also played a significant role in the development of hospitals. Before 1946, more than 1,000 counties in the nation had no health facilities at all. A. Treloar & D. Chill, *Patient Care Facilities: Construction Needs and Hill-Burton Accomplishments* 11 (1961). In 1946, the Hill-Burton Act, *supra*, was passed to improve the situation, and more than half of hospital construction accomplished under that Act has been in areas with no hospital facilities. Treloar, *supra*, at 12, 14. "[R]oughly, 42 per cent of the county hospitals in operation in 1956 opened" after the end of World War II, and "[u]ndoubtedly, much of this latter growth was due to the federal grants for hospital construction received under the terms of the Hill-Burton Act of 1946. . . . In the state of Texas alone, fifty-three such institutions were founded in the interval from 1946 to 1956." J. Hamilton, *Patterns of Hospital Ownership and Control* 76 (1961).

In its jurisdictional statement (p. 14), the Government notes that some public transit systems have management contracts with outside concerns. The same arrangement exists with hospitals. In 1980, investor-owned firms held 150 management contracts with city or county hospitals. *City, County Contracts Lead to Hospital Sales*, Modern Healthcare, Sept. 1980 at 44. The most rapid growth in this area has occurred in municipal and county owned facilities and includes the 1,300-bed Cook County Hospital in Chicago, J. Goldsmith, *Can Hospitals Survive?* 114 (1981), and the 1465-bed John J. Kane Hospital in Pittsburgh, Mannisto, *For-Profit Systems Pursue Growth in Specialization and Diversification*, Hospitals, Sept. 1, 1981 at 72. Moreover, unlike public transit systems, which have become predominantly publicly owned, many public hospitals are selling out to private operators. Hull, *How Ailing Hospital in South Was Rescued by a For-Profit Chain*, Wall St. J., Jan. 28, 1983, at 1, col. 1. Furthermore, hospitals have long been subject to the very same statutes cited by the Government as regulating transit. In fact, when *National League* was decided, there had been more extensive FLSA coverage of hospitals and schools since both activities were brought totally under the FLSA in 1966, whereas public tran-

sit was given an overtime exemption for operating employees until 1976. Yet, this Court had no difficulty in exempting both hospitals and schools under the Tenth Amendment.[23]

C. Federal Funding of Transit is Irrelevant.

In its jurisdictional statement (pp. 18-20) the Government challenges *National League* immunity on the ground that funds provided under UMTA allegedly hastened the public takeover of transit systems. This contention draws absolutely no support from *National League* or *LIRR*, it constitutes a convoluted attempt to apply Spending Power arguments in a Commerce Clause case, and it is invalidated by this Court's decision in *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

Initially, it should be noted that neither the City of San Antonio nor SAMTA received one cent of federal assistance in acquiring the local transit operations in San Antonio. The City bought the San Antonio Transit Company's assets in 1959, five years *before* federal grants were available. SAMTA acquired SATS' equipment and facilities in 1978 through the issuance of bonds payable only out of local revenues—not out of federally provided funds.

More importantly, this Court's decision in *Jackson Transit* forecloses the Government's federal funding argument. In that case, a unanimous Court rejected a transit union's claim that through the grant of UMTA funds Congress intended to regulate transit labor relations. The Court specifically held that "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations be-

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[23] Data regarding the exempt activity of solid waste collection (sanitation) provides analogous reenforcement for the Tenth Amendment immunity of public transit. In 1975, private firms collected residential refuse in 67% of 2,060 cities of all sizes surveyed, 61.4% of which relied entirely on private firms. E. Savas, *The Organization and Efficiency of Solid Waste Collection* 45, 63 (1977). "Waste disposal is one of today's hot new glamour industries . . . [which] has become a $10 billion business. . . ." Blyskal, *Glittering, Glamorous Garbage*, Forbes, June 8, 1981 at 156.

tween local governmental entities and transit workers." *Id.* at 27. It follows that receipt of those very same funds cannot abrogate the Tenth Amendment rights of those same governmental entities, particularly since nothing in UMTA requires compliance with the FLSA. *See Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").[24]

In arguing that UMTA grants affect transit's *National League* immunity, the Government is really making a Spending Power argument in a Commerce Clause case. This difference was explicitly recognized in *National League*. 426 U.S. at 852 n.17. The Court obviously did not consider federal funding relevant since the dissent pointed out that during fiscal 1977 the President's proposed budget recommended $60.5 billion in assistance to the States, including $716 million for law enforcement assistance. *Id.* at 878.[25]

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[24] *See also* § 9(d) of UMTA (49 U.S.C. § 1608(d) (Supp. V 1981)), which prohibits use of UMTA provisions to "regulate in any manner the mode of operation of any mass transportation system" receiving a section 1602 grant except to require compliance with "undertakings furnished . . . in connection with the application for the grant."

[25] Even if UMTA funding were taken into account, local government's use of federal funds to acquire transit operations as a necessary step to ensure continuation of an essential local service is not materially different from federal subsidization of other local government activities which are exempt under *National League*. For example, between 1973 and 1981, $33.3 billion was appropriated for wastewater treatment plant construction, which was second only to federal-aid highway programs in terms of federal public works expenditures. *Municipal Wastewater Treatment Construction Grants Program: Hearings on S. 975 & S. 1274 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment & Public Works*, 97th Cong., 1st Sess. 7, 16 (1981). This is almost three times the $13 billion in federal aid to transit which the Government (jurisdictional statement p. 19) claims were made by 1978. An activity specifically exempted in *National League*, which was essentially created as a result of federal funding, is solid waste management (sanitation). According to *State Activities in Solid Waste Management, 1974* at iii (EPA, Office of Solid Waste Mgmt. Programs 1975) "[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the Solid Waste Disposal Act of 1965." See

II. THE FLSA CANNOT BE APPLIED TO ANY STATE OR LOCAL GOVERNMENT EMPLOYEES ABSENT A CONSTITUTIONALLY VALID AMENDMENT[25]

The necessary result of *National League* is to remove the great majority of state and local government employees from the provisions of the FLSA. Although the FLSA has a severability clause (29 U.S.C. § 219 (1976)), which creates a presumption that unconstitutional provisions of the FLSA are severable, *see INS* v. *Chadha*, 103 S. Ct. 2764, 2774-76 (1983), that clause does not authorize the application of the FLSA, which has been held unconstitutional as to a majority of the class of public employees it was intended to cover, to the

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also discussion, *supra*, regarding the role of federal funds in the development of public hospitals.

During fiscal 1980 (the last year for which such data could be found), over $445 million in federal grants were made to local governments and private entities and individuals in Bexar County. This included approximately $6.4 million in construction grants for wastewater treatment works, $.9 million for parks and recreation, $44.6 million for education, $96.8 million for health and human services, $47.9 million for housing and urban development, $23.6 million for comprehensive employment and training programs, $2 million for airports, $9.5 million for UMTA capital and formula grants, and $15.8 million for revenue sharing. *Geographic Distribution of Federal Funds in Texas* 17-20 (Community Serv. Admin. 1980). In fiscal 1982, federal aid to Texas and its political subdivisions was $3.73 billion. *Federal Aid to States Fiscal Year 1982* at 1 (Dep't of the Treasury, Fiscal Service-Bureau of Gov't Fin. Operations, Div. of Gov't Accounts & Reports (1983)). This sum included approximately $190 million for elementary and secondary education, *id.* at 8; $173 million for construction of wastewater treatment works, *id.* at 10; $682 million for medical assistance, *id.* at 11; $8 million for law enforcement assistance, *id.* at 17; $20 million for airport and airway trust fund, *id.* at 19; $78 million for UMTA assistance, *id.* at 21; and $233 million in general revenue sharing, *id.* at 21.

[25] This question was pled and briefed in the proceeding below, but the district court did not pass on its merits. The Court may consider that issue since "an appeal under 28 U.S.C. § 1252 brings the 'whole case' before the Court." *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975); *accord*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977).

remainder of the class, thereby creating a program different from the one Congress actually adopted.[27]

In *Sloan* v. *Lemon*, 413 U.S. 825 (1973), a three-judge district court had declared a Pennsylvania statute, which provided for reimbursement of funds for nonpublic education, to violate the First Amendment's establishment clause because it applied to sectarian schools. Although the state law contained a severability clause, the court declined to sever out sectarian schools because "so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools." *Id.* at 834. The Court was asked to declare the provision severable and allow tuition reimbursement for parents of children attending schools that were not church-related. The Court declined the invitation because "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." *Id.*

Recently, in *Brockett* v. *Spokane Arcades, Inc.*, 454 U.S. 1022 (1981), the Court affirmed the Ninth Circuit's decision (631 F.2d 135 (1980)) that the unconstitutionality of injunction and closing order provisions of a Washington moral nuisance law required invalidation of the entire statute despite the presence of a severability clause. Relying on *Sloan*, the court of appeals had held that the elimination of a vital part of the statutory scheme would eviscerate the statute and create a

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[27] Extension of the 1974 FLSA amendments to public employees not excluded by the *National League* holding would also result in judicial reformulation of the amendments to add words of limitation (codifying this Court's "traditional governmental function" holding into the FLSA's definition of "public agency") where none presently exist. A severability clause does not intend for courts "to dissect an unconstitutional measure and reform a valid one out of it by inserting limitations it does not contain [since] [t]his is legislative work beyond the power and function of the court." *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922) (involving a severability clause indistinguishable from the one in the FLSA).

program quite different from the one actually adopted. This Court affirmed by memorandum.

National League withdraws from FLSA coverage a major part of the class of public employees which Congress intended to include. The FLSA sets up no dichotomy between traditional and nontraditional governmental functions, and therefore to reframe the statute to incorporate such a distinction would create a program different from the one Congress actually adopted. *See also Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975). *INS* v. *Chadha*, 103 S. Ct. 2764 (1983) does not require a different result. Congress relied on this Court's decision in *Maryland* v. *Wirtz*, 392 U.S. 183 (1966) when it extended the FLSA to the entire public sector, and it presumably did not intend to enact a program covering only a small number of public employees. *See* H. R. Rep. No. 93-913, 93d Cong., 2d Sess. 6-7, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2816-17; *see also* 118 Cong. Rec. 24,240, 24,749 (1972).

CONCLUSION

SAMTA respectfully submits that the judgment of the district court is manifestly correct and should be summarily affirmed. If the Court concludes that summary affirmance is inappropriate, then the case should be briefed and argued.

Respectfully submitted,

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Nos. 82-1951 and 82-1913

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Does *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), in concluding that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore cannot constitutionally be applied to traditional governmental functions, preclude application of these statutory provisions to publicly owned local mass transit systems?

2. Did that decision find unconstitutional so much of Congress' intended coverage of state and local governmental functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unwarranted to apply these requirements to publicly owned local mass transit systems without new congressional enactment?

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MOTION TO AFFIRM

The American Public Transit Association ("APTA"), appellee, moves, pursuant to Rule 16 of the Supreme Court, to affirm the judgment of the court below on the ground that such court correctly held that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), controls this case.

STATEMENT OF THE CASE

1. San Antonio established a publicly owned local mass transit system in 1959.[1] In 1978, appellee San Antonio Metropolitan Transit Authority ("SAMTA") acquired the assets from the city and now operates the local public transit system providing service to the city and most of Bexar County, Texas. SAMTA, a political subdivision of the State of Texas, is "exercising public and essential governmental functions." Tex. Rev. Civ. Stat. Ann. art. 1118x § 6(a) (Vernon Supp. 1982). SAMTA provides bus service to the entire community at fares which cover only 25 percent of operating expenses, and service at reduced fares for school children, the elderly and the handicapped. Some downtown service is provided free of charge. The operational deficit is recovered through government funding, more than one-third of which is generated by state sales tax revenues. Acquisition of the system was financed entirely by public bonds; no federal funds were used.

2. This case arises out of a dispute between the States and the federal government that has ensued since 1966, when Congress, acting pursuant to its Commerce Clause powers, amended the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) ("FLSA"), at-

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[1] Facts concerning local transit in San Antonio are drawn from Affidavit of Wayne M. Cook accompanying Brief for San Antonio Metropolitan Transit Authority in Support of Motion for Summary Judgment.

tempting for the first time to include a limited number of state activities within its coverage. In that year, it extended FLSA coverage to public as well as private schools, institutions, hospitals, and some public employees of "street, suburban or interurban electric railway, or local trolley or motorbus carrier[s],"[2] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830, 831. The operators, drivers and conductors of covered transit services, however, were excluded by specific exemption from the overtime compensation provisions of the 1966 statute. Pub. L. No. 89-601, § 206, 80 Stat. 830, 836 (1966). The 1966 amendments extended the limited coverage of private transit enacted in 1961, Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72, to similar categories of public transit employees. In 1974, after this Court's decision in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), affirmed the power of Congress to cover state activities, Congress amended the statute to embrace most state and local employment relationships in areas where private employers were covered. The overtime exemption for transit operators, private or public, was phased out over a two-year period. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

State and local governments successfully challenged Congress' attempt to apply the FLSA wage and hour provisions to most activities of state and local governments in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). This Court cited several examples of the numerous state activities affected by its decision, but did not

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[2] Street electric railways are a form of local transit as are trolleys and buses. Historically they have not been part of the main-line railroad system, unlike commuter railroads, *see* American Public Transit Association, *Transit Fact Book* 72 (1981) ("*Transit Fact Book*").

specifically include or exclude publicly owned local mass transit.

3. Federal appellant first indicated its intent to apply the FLSA to publicly owned local mass transit over two years after *National League of Cities* was decided, in a letter dated September 17, 1979 to a transit union.[3] SAMTA learned of the letter and sued on November 21, 1979 to declare such application unconstitutional. APTA, the members of which include most of the local mass transit systems owned by state and local governments, intervened. On December 21, 1979, federal appellant formally amended its FLSA regulations—without any public notice or comment—to assert that local publicly owned mass transit agencies do not perform a traditional governmental function, and therefore are subject to the FLSA. 44 Fed. Reg. 75,628 (1979); 29 C.F.R. § 775.2(b) (1982).[4] Federal appellant also counterclaimed on behalf

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[3] Letter from the Deputy Administrator of the United States Department of Labor to the Amalgamated Transit Union (September 17, 1979), Brief of American Public Transit Association in Support of Motion for Summary Judgment, Exhibit A.

[4] Also listed in the regulation as functions to which the federal government believed the FLSA could be applied were off-track betting corporations, generation and distribution of electric power, provision of residential and commercial telephone and telegraphic communication, production and sale of organic fertilizer as a by-product of sewage processing, production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and repair and maintenance of boats and marine engines for the general public. 29 C.F R. § 775.3(b) (1982). At the same time, federal appellant indicated that the Department of Labor would not seek to apply the FLSA to libraries and museums. 29 C.F.R. § 775.4(b) (1982).

of SAMTA's employees for back pay[5] and injunctive relief.[6] An employee, Joe G. Garcia, intervened.

The district court granted SAMTA's and APTA's motions for summary judgment on November 17, 1981, ruling that local public mass transit systems (including SAMTA) are "traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)." U.S. J.S. App. 23a. Appellants here appealed directly to this Court pursuant to 28 U.S.C. § 1252 (1976). The Court vacated the judgment and remanded the case "for further consideration in light of [the later-decided] *United Transportation Union* v. *Long Island Rail Road Co.*, 455 U.S. 678 (1982) [("*LIRR*")]." *Donovan* v. *San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

4. After further briefing and oral argument, the district court found that this Court's decision and reasoning

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[5] The FLSA authorizes the Secretary of Labor to seek back pay and equal liquidated damages for employees for up to three years if an employer did not compensate employees in the manner established by the FLSA. 29 U.S.C. § 216(c) (1976 & Supp. IV 1980).

[6] While this action is the only case in which the federal government is a party, the issue has been raised in other federal appellate courts. *Compare, e.g.*, *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982) (concluding that the FLSA may not be applied to a state highway and transit authority) *with Alewine* v. *City Council of Augusta*, 699 F.2d 1060, *reh'g denied*, 707 F.2d 523 (11th Cir. 1983), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Aug. 17, 1983) (No. 83-257); *City of Macon* v. *Joiner*, 699 F.2d 1060 (11th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 388 (U.S. June 3, 1983) (No. 82-1974); *and Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983) (concluding that the FLSA may be applied to local publicly owned mass transit systems). *See also Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F 2d 50 (6th Cir. 1983) (reversing grant of summary judgment for transit agency and remanding for further proceedings).

in *LIRR* were fully consistent with its previous conclusion that "operation of a public transit system is a governmental function entitled to Tenth Amendment immunity." U.S. J.S. App. 2a.[7]

ARGUMENT

In *National League of Cities*, this Court reviewed the same statutory provisions at issue here and decided that the ability to determine the wages, hours and overtime compensation of state and local employees is an essential attribute of state sovereignty. The Court therefore held that FLSA wage and overtime requirements may not be applied to state and local governments where they "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

In subsequent decisions, this Court has addressed Tenth Amendment challenges to Congress' exercise of Commerce Clause power in other statutory contexts. In each case it distinguished the federal statutory provisions at issue in *National League of Cities*, consistently reaffirming that the FLSA wage and overtime provisions cannot constitutionally be applied to the traditional functions of state and local government. *EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1060 (1983); *FERC* v. *Mississippi*, 456 U.S. 742, 758-59 (1982); *United Transportation Union* v. *Long Island Rail Road Co.*, 455 U.S. 678, 685 (1982); *Hodel* v. *Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 (1981). Thus, the only question now before this Court is whether to apply *National League of Cities* to an activity of state and local

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[7] The court's order of February 14, 1983 was withdrawn and reentered effective on that date on February 18, 1983 to correct typographical errors.

government that, while not specifically mentioned in that opinion, is one of the "numerous line and support activities," 426 U.S. at 851 n.16, that "states have traditionally afforded their citizens," *id.* at 851.[8]

The facts in the record fully support the finding of the court below that publicly owned local mass transit is in an area of traditional governmental functions. Summary affirmance is therefore appropriate.

I. The Narrow Issue In This Case Is Whether Publicly Owned Local Mass Transit Is A Traditional Function Of State And Local Government

As its subsequent decisions have made increasingly clear, in *National League of Cities* this Court conclusively determined all but possibly one of the requirements for invalidating application of the FLSA to local publicly owned mass transit. *See LIRR*, 455 U.S. at 684 n.9; *Hodel*, 452 U.S. at 287-88. First, this Court held that application of the FLSA to the States and their political subdivisions is a regulation of the "States as States," 426 U.S. at 845. Second, it decided that the FLSA's regulation of minimum wage and overtime compensation for state and local employees addresses a matter that is an "undoubted attribute of state sovereignty." *Id.* Furthermore, in *LIRR* this Court recently confirmed that *National League of Cities* had considered the balance between the federal and state interests, *see* 426 U.S. at 852-53, *see also id.* at 856 (Blackmun, J., concurring), and had determined that the federal interest in the FLSA was

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[8] *National League of Cities* was founded on an analysis of the limitations imposed by the Tenth Amendment and our system of federalism on the otherwise legitimate exercise of congressional Commerce Clause powers; the issue is not, as appellant Garcia suggests, G. J.S. at 11, whether "Congress by its generosity forfeited its authority under the Commerce Clause."

not "so great as to 'justif[y] State submission.' " *LIRR*, 455 U.S. at 684 n.9 (*quoting Hodel*, 452 U.S. at 288 n.29).

The one issue not expressly resolved by *National League of Cities* is whether publicly owned local mass transit is a traditional governmental function. This is the sole question presented because *National League of Cities* has already decided the first part of the final inquiry: whether requiring the States to comply with a federal law would "directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' " *Hodel*, 452 U.S. at 288 (citation omitted).[9] Here, the federal law is the FLSA, which when applied to traditional governmental functions, "impermissibly interfere[s]" with an essential attribute of state sovereignty, leaving little of the "States' 'separate and independent existence,' " 426 U.S. at 851 (citation omitted).[10] *National*

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[9] This was "the key prong of the *National League of Cities* test" applicable to *LIRR*, 455 U.S. at 684, and was the focus of the inquiry in *EEOC* as well, 103 S. Ct. at 1061. Distinguishing *National League of Cities*, however, this Court found that the statutory provisions at issue in *EEOC* (the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) (as amended)) did not unconstitutionally displace an attribute of state sovereignty and those in *LIRR* (the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1976)) did not involve a traditional state governmental function.

[10] Contrary to federal appellant's suggestion, U.S. J.S. at 18-21, the inquiry mandated by *National League of Cities* into whether imposition of a federal program would endanger the States' "separate and independent existence," 426 U.S. at 851, calls for evaluation of the effect on state sovereignty by the displacement of state policy choices regarding wages and hours, rather than consideration of whether state provision of certain services, *e.g.*, transit, parks, and hospitals, is essential to the States' "separate and independent existence," *id.* As the Court stated in *EEOC*, "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 103 S. Ct. at 1062 (citation omitted).

League of Cities held that federal displacement of the States' prerogative to establish wage and overtime compensation for their employees engaged in areas of traditional functions would impair the States' " 'ability to function effectively in a federal system,' " *id.* at 852 (citation omitted).[11]

As this Court reaffirmed in *EEOC*, "*National League of Cities* held that 'there are attributes of sovereignty attaching to every state government which may not be

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[11] "[P]articularized assessments of actual impact" of federal regulations, of course, are not necessary since it is the States' policy choices that are constitutionally protected. *National League of Cities*, 426 U.S. at 851. "The determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *FERC*, 456 U.S. at 770 n.33 (*quoting Hodel*, 452 U.S. at 292 n.33).

The FLSA overtime requirements, however, do have a direct impact on the ability of state and local governments to choose how they structure routes, employee work hours, service schedules, record keeping and wage rates. For example, the FLSA requires payment of time-and-one-half for hours worked over forty hours per week, which is computed in accordance with a federal statutory formula. 29 U.S.C. § 207(a) (1976); 29 C.F.R. § 197 (1982). Many public transit systems find it necessary to schedule their employees in two split shifts at peak commuter hours, *see, e.g.*, *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 303 (1965) (testimony of C. Cochran), and to provide premium compensation for the split scheme in lieu of FLSA mandated overtime, *cf. Fair Labor Standards Amendments of 1973: Hearings on H.R. 4757 and H.R. 2831 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 165 (1973) (testimony of C. Cochran), *id.* at 170 (testimony of F. Hill); S. Rep. No. 300, 93d Cong., 1st Sess. 126 (1973) (minority views of Messrs. Dominick, Taft and Beall).

Such scheduling is not merely a matter of management efficiency; it is a means, for example, by which the State facilitates employment

impaired by Congress' and that '[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime.' 426 U.S. at 845." 103 S. Ct. at 1061 n.11. Thus, *National League of Cities* has decided part of the final test, leaving unresolved only whether local publicly owned mass transit is a traditional function of state and local government. The district court in this litigation answered in the affirmative. This precise issue, in keeping with the suggestion of the federal government in that case,[12] was not addressed in *LIRR*.

II. The Lower Court Decision Is Compelled By *National League Of Cities*

As the district court concluded, the provision of publicly owned local mass transit services is as integral to the public responsibility of state and local government as are "fire prevention, police protection, sanitation, public health, and parks and recreation," *National League of*

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for low income groups and education for inner city students. Application of FLSA requirements would require redundant payments, leaving the States with "less money for other vital State programs," and would limit their ability to pursue their "social and economic policies beyond their immediate managerial goals." *See EEOC*, 103 S. Ct. at 1063. Of course, to minimize the cost impact of the federal requirements the States could change their scheduling practices, but this would "have the effect of coercing the States to structure work periods in some employment areas . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *National League of Cities*, 426 U.S. at 850.

[12] See note 22, *infra*.

Cities, 426 U.S. at 851, and schools and hospitals, *id.* at 855, which, while "obviously not an exhaustive catalogue," *id.* at 851 n.16, this Court has held are "typical" examples of the "numerous line and support activities which are well within the area of traditional operations of state and local governments," *id.*[13]

The provision of a local transportation infrastructure has been an integral function of state and local governments since the earliest days of our Republic. *See Molina-Estrada*, 680 F.2d at 845. With the industrial age and the growth of the nation's urban areas, local streets and roads became inadequate to meet this governmental obligation. Indeed, "[i]n 1905 congested traffic at rush hours was

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[13] While distinctions can be drawn between publicly owned local transit and the activities enumerated in *National League of Cities*, and "[w]hile there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities*, 426 U.S. at 855 (footnote omitted).

Federal appellant attempts to distinguish publicly owned mass transit from the other protected activities by reliance on an early tax case, *Helvering* v. *Powers*, 293 U.S. 214 (1934), which held that the Trustees of the Boston Elevated Railway Company were not immune from federal income taxation. The activity addressed in that case, however, was the temporary quasi-public operation of a transit system. Furthermore, as Justice Rehnquist stated in his dissent in *Fry* v. *United States*, 421 U.S. 542, 555 n.1 (1975): "The Court in *Helvering* v. *Gerhardt*, 304 U.S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability." *See also Massachusetts* v. *United States*, 435 U.S. 444, 458-59 (1978) (Brennan, J., concurring); *Graves* v. *New York*, 306 U.S. 466 (1939).

described as the number one problem of large cities in the United States." W. Owen, *The Metropolitan Transportation Problem* 6 (rev. ed. 1966). As the problems of urbanization increased (*e.g.*, unemployment, congestion, traffic safety, pollution and mobility for students and the elderly) state and local governments increasingly turned to public transit to meet community-wide needs.

Several major cities entered into the provision of publicly owned transit services financed through state and local bond issues or taxes early in this century.[14] In fact, before the enactment of federal legislation to provide financial assistance, more than half of the nation's 21 largest cities provided publicly owned transit services. *See infra* at 27.

By 1978, about 90 percent of transit revenues, total transit miles, total transit vehicles owned and leased, and

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[14] *See, e.g.*, C. Thompson, *Public Ownership* 225-26, 240-41 (1925). As early as 1925, this author commented: "So we now have in America not only numerous smaller cities owning and successfully operating municipal street car lines, but three of our larger cities [are also doing so]." *Id.* at 222.

San Francisco started providing local public mass transit service in 1912, Seattle in 1919, Detroit in 1922 and New York City in 1932. Cleveland acquired its public transit system in 1942, and public transit systems serving Boston and Chicago were acquired in 1947. American Public Works Association, *History of Public Works in the United States, 1776-1976* 177 (1976). Los Angeles, San Antonio, and Sacramento were served by publicly owned systems by 1959, J. Moody, *Moody's Transportation Manual* a70 (1960), Oakland by 1960, Memphis by 1961, J. Moody, *Moody's Transportation Manual* a72 (1961), and Miami in 1962, J. Moody, *Moody's Transportation Manual* a78 (1962). Public transit systems serving Long Beach and St. Louis were acquired in 1963, followed by those serving Dallas and Pittsburgh in early 1964, J. Moody, *Moody's Transportation Manual* a60-a61 (1964).

linked passenger trips were attributable to publicly owned mass transit systems. Affidavit of Stanley G. Feinsod accompanying Brief of American Public Transit Association in Support of Motion for Summary Judgment ¶ 4 ("Feinsod Affidavit"); *Transit Fact Book* at 43. Today almost all of the metropolitan areas in the country with a population over 200,000 are served by transit systems owned by state or local government agencies.[15]

Moreover, as time has gone on, local governments in rural areas have also responded to this need. By 1981, 248 out of 339 transit operations in non-urbanized areas (73 percent) were publicly owned.[16] The pervasiveness of state and local ownership of public transit is comparable to other traditional governmental functions expressly listed in *National League of Cities*.[17]

Thus, as the district court concluded, local publicly owned mass transit is a traditional function of state and local governments. It is the type of public service that the

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[15] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 1-12 (Aug. 1981).

[16] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

[17] The fact that private companies also provide some local transit services cannot be a determinative factor under *National League of Cities*. In 1979, for example, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools. U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 214 at 132 (1981) (published annually) ("*SAUS: 19xx*"). Moreover, in 1974, private firms collected 50 percent of all residential waste and 90 percent of all commercial waste. H.R. Rep. No. 1461, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6323, 6325.

States have determined over many years is necessary to meet their fundamental public welfare obligations in the fulfillment of their "role in the Union." *LIRR*, 455 U.S. at 687. The essential and sovereign character of public transit services has been expressly recognized by state constitutions and legislatures.[18]

Appellants contend that because transit has become a pervasively state and local governmental function in recent decades, this activity is somehow disqualified from protection under *National League of Cities*. First, their premise overlooks the fact that publicly owned transit became a widespread, well-recognized state and local function early in the process of urban industrialization and the development of transit technology. Second, any "static historical view" was expressly rejected by this Court in *LIRR*, 455 U.S. at 686, when it clarified that it would "not merely . . . look[] only to the past to determine what is 'traditional.' " *Id.* It stated:

> *This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal*

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[18] Examples of state laws decreeing public mass transit to be an essential function of government are considered in *Inman Park Restoration, Inc.* v. *Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore* v. *Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573 (5th Cir. 1978); *Henderson* v. *Metropolitan Atlanta Rapid Transit Authority*, 236 Ga. 849, 853, 225 S.E.2d 424, 427 (Ga. 1976); *Mass Transit Administration* v. *Baltimore County Revenue Authority*, 267 Md. 687, 690, 298 A.2d 413, 415 (Md. 1973); *Teamsters Local Union No. 676* v. *Port Authority Transit Corp.*, 108 N.J. Super. 502, 507, 261 A.2d 713, 716 (N.J. Super. Ct. Ch. Div. 1970); *County of Niagara* v. *Levitt*, 97 Misc.2d 421, 422, 411 N.Y.S.2d 810, 812 (N.Y. Sup. Ct. 1978); *Pennsylvania* v. *Erie Metropolitan Transit Authority*, 444 Pa. 345, 350, 281 A.2d 882, 885 (Pa. 1971).

> *regulation*. Rather it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence." *Ibid.*, at 851.

Id. at 686-87 (emphasis supplied). *Cf. First National City Bank* v. *Banco Para El Comercio Exterior*, 51 U.S.L.W. 4820, 4826 n.27 (U.S. June 17, 1983).

State and local governments in great numbers assumed the responsibility for providing mass transit services and funding them from tax revenues after it became clear that essential community-wide transit services could not be provided profitably in the private sector.[19] States have undertaken this obligation because they regard the maintenance of an urban transportation infrastructure accessible to all residents "as integral parts of their governmental activities," *National League of Cities*, 426 U.S. at 854 n.18, and as "governmental services which their citizens require," *id.* at 847. These services, moreover, are for the benefit of the local community, rather than as part of an integrated network that serves all parts of the country.

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[19] *Transit Fact Book* at 27; D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. and Labor Rel. Rev. 95, 99 (1971).

APTA is unaware of any publicly owned local mass transit system that does not operate on a deficit basis. Feinsod Affidavit ¶ 6. Fare box revenues constitute only about half of operating costs, with state and local aid providing about 33 percent and federal aid providing about 15 percent of operating costs. *Id.* at ¶ 7. It is beyond doubt that states do not provide transit services to "engag[e] in business activities which have as their aim the production of revenues in excess of costs." *See Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1 (1978) (Burger, C.J., concurring). Nor did state and local governments assume the responsibility for providing transit services to perpetuate a failing enterprise.

Public transit agencies are organizationally integrated or closely coordinated with other essential local governmental services such as street and traffic management, public works, land use planning and zoning—often under the umbrella of a common city department or regional authority. Feinsod Affidavit ¶ 11. Transit agencies form an important part of a local government budget. *See, e.g., Subway-Surface Supervisors Association* v. *New York City Transit Authority*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389, 404 N.Y.S.2d 323, 329 (N.Y. 1978) (transit system is performing a governmental function because of the "intertwinement" between its finances and the city's). In order to keep the user charges low enough to serve those in a local community dependent on inexpensive transportation,[20] local public mass transit is heavily subsidized with general and special local tax revenues. Feinsod Affidavit ¶ 8. Reduced fares are provided for students and the elderly, *id.* at ¶ 9B, and fares are kept low in the face of rising costs, making transportation accessible to the poor and to low and middle income workers, *id.* at ¶ 9A.

As the district court found, referring to *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979):

> Public transit benefits the community as a whole[,] . . . is provided at a heavily subsidized price[,] . . . [and] cannot be provided at a profit [, and therefore is

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[20] The fact that publicly owned local transit systems charge fares does not convert them into businesses and therefore activities which ought not to be protected under *National League of Cities*. User charges also contribute to the operation of hospitals, parks and recreation, and sanitation. Institute of Public Administration, *Financing Transit: Alternatives for Local Government* 228 (July 1979). Some public schools also charge tuition or user fees. *See Mueller* v. *Allen*, 51 U.S.L.W. 5050 (U.S. June 29, 1983).

> provided] for public service, not for pecuniary gain. [Thus] government is particularly well suited . . . [and, in fact,] is the only component of society that can provide the service.
>
> Finally, government today is the primary provider of transit services.

U.S. J.S. App. 18a-19a. In sum, publicly owned local mass transit falls squarely within the category of activities protected in *National League of Cities*.

III. The Lower Court's Conclusion Is Consistent With *Long Island Rail Road* And Other Recent Decisions Of This Court

In seeking to override the controlling effect of *National League of Cities*, appellants misconstrue subsequent judicial decisions and the relevance of federal funding of local public mass transit.

1. The district court's findings regarding publicly owned local mass transit are fully consistent with this Court's decision in *LIRR*. In upholding the application of the Railway Labor Act to the employees of the state-owned Long Island Rail Road, this Court followed and expressly affirmed its decision in *National League of Cities*. Following a line of prior Supreme Court decisions involving statutes other than the FLSA—*Parden* v. *Terminal Railway*, 377 U.S. 184 (1964); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936)—this Court stated in *National League of Cities* that "the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . .,' " 426 U.S. at 854, n.18 (citation omitted), is not "in an area that the States have regarded as integral parts of their governmental activities," *id.*[21]

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[21] The Court noted in *LIRR* that only two of the seventeen commuter railroads were publicly owned. 455 U.S. at 686 n.12.

Railroads are perhaps unique among state activities because even when publicly owned they still serve as part of the national railroad system and "have been subject to comprehensive [industry-specific] federal regulation for nearly a century." *LIRR*, 455 U.S. at 687 (footnote omitted).[22] By contrast, local public mass transit historically has been regulated by state and local governments.[23]

This Court further determined in *LIRR* that a state would be eroding federal authority if, by acquiring a small part of the privately-owned national railroad system, it could exempt its employees from federal Railway Labor Act protection. This statement was made, however, in the context of a function, *i.e.* railroads, which:

> have been subject to *comprehensive* federal regulation for nearly a *century*. The Interstate Commerce Act—the first *comprehensive* federal regulation of the industry—was passed in 1887. A year earlier we had held that *only* the Federal Government, not the states, could regulate the interstate rates of railroads. . . . The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888.

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[22] Indeed, federal appellant represented to this Court in *LIRR* that "the LIRR, *despite the evolving character of its operations*, remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable* from conventional intraurban transit systems." Brief for United States as *Amicus Curiae* at 12, *LIRR*, 455 U.S. 678 (1982) (emphasis supplied). "As is reflected in the definitions and statutory provisions cited . . . *one important attribute of commuter railroads is their genesis as a part of the railroad industry, rather than as a form of intraurban transit.*" *Id.* at 26 n.19 (emphasis supplied); *see also id.* at 25-27, nn.19-20.

[23] *See* text accompanying notes 25-28, *infra*. Congress recognized this fact in the FLSA by expressly limiting coverage to those local mass transit systems "[whose] rates and services . . . are subject to regulation by a State or local agency." 29 U.S.C. § 203(r)(2) (1976).

> . . . The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry.

455 U.S. at 687-88 (footnotes omitted) (emphasis supplied). "Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system."[24] *Id.* The LIRR acceded to this federal regulatory authority for the first 13 years of its ownership by the state, *id.* at 690; it was only in the midst of the cooling-off period during a strike that the state attempted to convert the LIRR's corporate status, "apparently believing that the change would eliminate Railway Labor Act coverage," *id.* at 681.

Local mass transit, in contrast, has always been a local responsibility. There simply is not, and never has been, any comprehensive federal system of law regulating local mass transit. *See Local Division 589, Amalgamated Transit Union* v. *Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). State or local laws have dictated, for example, the rates charged users of local transit,[25] equipment standards for transit

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[24] In *LIRR*, the Court stressed that "Congress [had] long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy." 455 U.S. at 688. Under these circumstances, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any other of the elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Id.* at 689.

[25] *See, e.g.*, Cal. Pub. Util. Code §§ 211, 216, 451 (West Supp. 1982); N.Y. Transp. Law § 141 (McKinney 1975); Wash. Rev. Code Ann. §§ 81.64.010, 81.64.080 (1962).

vehicles,[26] the licensing of drivers of those vehicles,[27] and traffic safety rules.[28]

The statutory history of the FLSA is indisputable. Congress did not even attempt to apply the FLSA to regulate the wages and hours of any private transit employees until 1961. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72. Its first limited attempt to extend these requirements to *public* transit employees (along with employees of public hospitals and schools) was in 1966, and even then Congress specifically excluded most private and public transit employees (*e.g.*, bus drivers) from the hour and overtime requirements. Even after *Wirtz*, when Congress attempted to extend the FLSA requirements to most public agencies, overtime coverage of public and private transit operators was to be phased in; it was not until 1976, only seven years ago, that Congress intended to extend the full reach of federal wage and hour regulation to most local public transit employees. State and local governments began to provide transit services prior to

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[26] *See, e.g.*, Cal. Pub. Util. Code § 7810 (West 1971); Cal. Veh. Code §§ 26711, 35106, 35250, 35400, 35550-35551.5 (West 1971); Ill. Ann. Stat. ch. 95½ §§ 1-107, 15-102 (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law §§ 104, 375, 385 (McKinney Supp. 1981); Wash. Rev. Code Ann. §§ 46.04.320, 46.37.005-46.37.500 (1962 & Supp. 1981).

[27] *See, e.g.*, Cal. Veh. Code § 12804 (West 1971 & Supp. 1982); Ill. Ann. Stat. ch. 95½ §§ 1-146, 6-104 (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law § 509a-509h (McKinney Supp. 1982); Wash. Rev. Code Ann. §§ 46.20.390, 46.20.440 (1970 & Supp. 1981).

[28] *See, e.g.*, Cal. Veh. Code §§ 21000 *et seq.* (West 1971 & Supp. 1982); Ill. Ann. Stat. ch. 95½ §§ 11-100 *et seq.* (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law §§ 1100 *et seq.* (McKinney 1970 & Supp. 1982); Wash. Rev. Code Ann. §§ 46.61.005 *et seq.* (1970 & Supp. 1982).

the enactment of the FLSA and well before Congress' attempt to extend it to private or public transit. By the time Congress attempted to apply the overtime provision of the FLSA to any transit system—public or private—the majority of residents of major urban areas was served by publicly owned transit systems, and the majority of transit employees worked for publicly owned systems.[29] Furthermore, when Congress or the Department of Labor did act, those actions were challenged in the courts. Therefore, it simply cannot be said that when state and local governments entered this area "they knew of and accepted" the application of the FLSA. *Cf. LIRR*, 455 U.S. at 690. By providing local transit services the states did not "erode federal authority in areas traditionally subject to federal statutory regulation," *id.* at 687. Rather, here the federal government seeks to extend its power into an activity the States were already conducting and into an area of historic regulation by the "States as employers." *See Hodel*, 452 U.S. at 286 (*quoting National League of Cities*, 426 U.S. at 841).[30]

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[29] By late 1964, 56 percent of transit employees worked for public authorities. *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 297 (1965) (testimony of C. Cochran).

[30] The court below recognized that:

> the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(3), 52 Stat. 1067 (1938); Pub. L. No. 87-30, §§ 2(c), 9; 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. *Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.*

U.S. J.S. App. 7a-9a (emphasis supplied).

The fact that some activities protected by *National League of Cities* were at one time conducted more significantly in the private sector than in the public sector was not relevant to that decision. Private organizations operated 75 percent of hospitals in 1945,[31] for example, but only 58.4 percent of hospitals in 1980.[32] But like local mass transit, and unlike railroads where there is "no comparable history of longstanding state regulation," *LIRR*, 455 U.S. at 688, hospitals are subject to extensive state regulation, including state licensing of hospitals and medical personnel.[33] Likewise, education—including curriculum and teacher licensing, for example—and police and fire protection, are heavily state-regulated. These are functions within the traditional sphere of state responsibility, and nothing in *LIRR* suggests that state acquisition of a private hospital, university or local mass transit system would so erode federal regulatory authority as to deny the State the immunity established by *National League of Cities*. Indeed, appellants would have to concede that there are numerous publicly owned hospitals, recreational facilities, schools and universities, museums and sanitation services that have been acquired from the private sector and are therefore no longer subject to FLSA requirements.

In an attempt to depict an erosion of comprehensive federal regulation, federal appellant cites other federal laws which apply to private local transit. U.S. J.S. at 22-23. But these laws apply equally to the private coun-

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[31] *Hospital Construction Act: Hearings on S. 191 Before the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 57 (1945) (statement of Dr. T. Parran, Surgeon General, United States Public Health Service).

[32] *SAUS: 1982-83*, Table 173 at 112.

[33] American Hospital Association, *AHA Guide* C18-C20 (1982).

terparts of the activities expressly protected in *National League of Cities*. For example, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981), regulates private conduct of all the expressly protected activities and transit, but it specifically exempts state and local government employees, including public transit employees. 29 U.S.C. at § 152(2). *See Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 23 (1982) ("labor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act"). From this fact the district court concluded, "*any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent.*" U.S. J.S. App. 7a-9a (emphasis supplied). The statutes cited do not establish a *comprehensive* scheme of federal regulation unique to transit labor relations, as, for example, the Railway Labor Act does for railroads. Instead, the cited statutes regulate certain particular employment conditions for virtually all private employers in interstate commerce. In contrast, public employers, including publicly owned transit systems, are generally subject to state collective bargaining laws that govern wages and hours for their employees. U.S. Department of Labor, *Summary of Public Sector Labor Relations Policies* (1981). Finally, the statutes cited, except perhaps the National Labor Relations Act, were enacted after the state and local governments of many of the major metropolitan areas were providing local public transit services. It cannot be said, therefore, that applica-

tion of Tenth Amendment immunity erodes federal authority.[34]

2. Appellants invoke the straw man of federal funding under the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601-1618 (1976) (as amended) ("UMTA"), to shore up their weak argument that the FLSA may be applied to publicly owned local transit. This Court was well aware that the activities protected in *National League of Cities* received substantial federal financial support, *see* 426 U.S. at 878 (Brennan, J., dissenting), yet the Court nevertheless held that the FLSA could not be applied to them.

Appellants would confuse Congress' Spending Clause powers, which were expressly not addressed in *National League of Cities*, 426 U.S. at 852 n.17, with its Commerce Clause powers, which are limited by the Tenth Amendment. UMTA is a regular federal funding statute, like federal grant programs that assist schools, hospitals, police and fire departments and sanitation.[35] *Cf. Penn-*

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[34] Federal appellant also cites the Equal Pay Act, 29 U.S.C. § 206 (1976 & Supp. V 1981), which was upheld against Tenth Amendment challenge in *Pearce* v. *Wichita County*, 590 F.2d 128 (5th Cir. 1979). Like *EEOC*, in which the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) (as amended), was upheld against Tenth Amendment challenge by a state park game warden, *Pearce* involved an employment category, public hospital employees, which with respect to the FLSA was expressly covered by *National League of Cities*. Thus, the fact that some federal labor laws may even apply to traditional governmental functions does not make the particular governmental functions any less traditional for the purposes of the FLSA overtime compensation requirements—which *National League of Cities* held cannot be imposed on the States.

[35] The federal appellant states that "[b]y 1978 more than $13 billion in federal aid to transit had been awarded under the UMT Act and other federal programs." U.S. J.S. at 19 (citation omitted). In the same years, more than $57.8 billion in federal aid was given to public

hurst State School and Hospital v. *Halderman*, 451 U.S. 1 (1981). Moreover, unlike the Railway Labor Act directly at issue in *LIRR*, UMTA does not purport to be part of a comprehensive system of federal regulation of local transit, *Local Division 589*, 666 F.2d at 633-34, nor does

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elementary and secondary schools alone. This is the sum of the figures for the school years ending in 1965 through 1978 (excluding 1967, for which data are not available). For years 1966, 1970, and 1975-1978, *see SAUS: 1981*, Table 218 at 135; for years 1965, 1968 and 1969, *see SAUS: 1970*, Table 149 at 105; for years 1971 and 1972, *see SAUS: 1972*, Table 157 at 106; for 1973, *see SAUS: 1976*, Table 186 at 117; and for 1974, *see SAUS: 1980*, Table 222 at 141. In 1977 to 1978, the federal government provided $7.7 billion in aid to public elementary and secondary schools, or 9.4 percent of all such revenue receipts. W. Grant & L. Eiden, *Digest of Education Statistics*, Table 66 at 75 (1982).

Similarly, in 1971 through 1981 the federal government had awarded states $27.11 billion in sewage treatment construction grants. U.S. Department of the Treasury, *Federal Aid to States* (published annually) ("*FAS: 19xx*"). The $27.11 billion figure is the sum of the annual figures. *See FAS: 1971* at 4; *FAS: 1972* at 4; *FAS: 1973* at 6; *FAS: 1974* at 5; *FAS: 1975* at 6; *FAS: 1976* at 8, 27; *FAS: 1977* at 6; *FAS: 1978* at 6; *FAS: 1979* at 7; *FAS: 1980* at 10; and *FAS: 1981* at 9.

In 1979, for example, the federal government subsidized local sanitation and sewage with $3.7 billion, *FAS: 1979* at 7, which accounted for 31.4 percent of total local expenditures of $11.77 billion on such services. U.S. Department of Commerce, *Environmental Quality Control, Governmental Finance: Fiscal Year 1978-1979*, Table C at 4 (1981).

This compares with only $2.96 billion provided by the federal government that year for local public mass transit, or 36.6 percent of available funds of $8.19 billion. *Transit Fact Book*, Table 5 at 46 and Table 19 at 67. The $8.19 billion includes all transit system revenues, operating subsidies and capital grants. It is assumed *arguendo* that capital outlays were provided in an 80%-20% federal/state ratio, and that all capital grants approved were actually provided.

any such system exist.[36] In *Jackson Transit Authority*, 457 U.S. at 27, this Court unanimously held that Congress "did not intend [UMTA] to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Nor does UMTA require fund recipients to comply with the FLSA.

Appellants claim that UMTA funding stimulated the widespread establishment of publicly owned transit services. They are wrong. But, in any event, this does not provide any basis for distinguishing transit from numerous state and local activities within the broad protected areas cited by this Court—for example, sanitation proj-

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[36] As the Court held in *Jackson Transit Authority*, 457 U.S. 15 (1982), the provision of UMTA that addresses state and local transit employees' collective bargaining rights in, for example, wages and hours—section 13(c)—does not establish any *federal* rights for employees of transit systems receiving UMTA funds in addition to those rights established by *state* law. This Court stated:

> Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.

Id. at 27 (footnote omitted).

Jackson Transit Authority sharply distinguished the effect of section 13(c) of UMTA on the federal rights of transit workers from the effect of a federal labor statute on the federal rights of railroad employees. *Id.* at 27 n.9. The Court thus found that the law applicable to local public transit workers was *not* similar to its decision in *Norfolk & Western Railroad Co.* v. *Nemitz*, 404 U.S. 37 (1971), that "a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2)(f) of the Interstate Commerce Act," *Jackson Transit Authority*, 457 U.S. at 27 n.9; with respect to transit, the Court determined that section 13(c) of UMTA "addresses 'municipal and State problems, and not Federal problems.' " *Id.* at 28 n.11.

ects such as tertiary treatment plants, educational projects such as Headstart and programs for the handicapped, and health programs such as the health systems planning agencies, that arguably would not even have existed but for federal funding.[37] Constitutional immunity cannot rest on the shifting sands of the federal budget process. Moreover, a result that leaves state highway or airport workers under a state compensation scheme and state public transit employees under the federal scheme would be dangerously politically divisive.

Contrary to appellants' contention, moreover, the trend toward public ownership of local mass transit was well established before the enactment of UMTA. Prior to the availability of UMTA funds, the majority of the

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[37] For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceded Federal legislation in this field." S. Rep. No. 1367, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, comprehensive, statewide health planning was "spotty and fragmented" prior to federal funding of such planning, *see* H.R. Rep. No. 2271, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3830, 3833. *See also* National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k *et seq.* (1976) (as amended) (*e g.*, 42 U.S.C. §§ 300*l*-1, 300*l*-2 (1976) (specifies structure and functions of local health systems agencies, which may themselves be local governmental units)). For education, in the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774, Congress explicitly stated that "State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children." The federal role is to be "a catalyst to local and State program growth." S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429.

largest urban centers had publicly owned systems. Of the nation's twenty-one largest cities (*i.e.*, with populations in excess of 500,000), twelve were served by publicly owned transit systems by 1964. *SAUS: 1965*, Table 14 at 19-20. There is no doubt that federal aid helped many cities, particularly smaller cities, enhance their direct responsibility for providing transit services as private systems were unable to operate profitably and were unable to satisfy the public welfare obligations that urban transit had assumed.[38] But it is simply historical revisionism to imply that state and local governments provide transit services because federal aid enticed them into doing so. Federal grant aid to cities in support of transit services—like federal aid to education, hospitals and law enforcement—simply demonstrates that Congress thought it important that States be able to meet their local public welfare responsibilities in these areas. The passage of UMTA clearly was not intended to encourage the acquisition of private transit systems by public agencies. *See, e.g.*, 49 U.S.C. § 1602(e) (1976); S. Rep. No. 82, 88th Cong., 1st Sess. 19 (1963).

IV. Alternatively, Application Of The Fair Labor Standards Act To Publicly Owned Local Mass Transit After *National League Of Cities* Is Impermissible In The Absence Of A Subsequent Amendment To That Act

Before *National League of Cities* overruled *Wirtz*, Congress extended FLSA requirements to all state and local government agencies, including public transit agencies. *National League of Cities* struck down as unconstitutional most of the intended coverage.

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[38] "Today nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century—traffic engineering, airports, parking facilities, health clinics, and a long list of others." W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966).

Despite the presence of a standard severability clause in the FLSA, 29 U.S.C. § 219 (1976), it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could not carry out its intent to cover all state and local employees.[39] *See Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973). *But cf. Immigration and Naturalization Service* v. *Chadha*, 103 S. Ct. 2764, 2775 (1983). Moreover, what remains after severance is not a "fully operative" and "workable administrative machinery." *Id.* Such federal intervention in wage and hour decisions for a small number of state employees and not for others is divisive and may undermine the States' leverage in labor negotiations with its employees not subject to federal law. Therefore, the minimum wage and overtime compensation provisions of the FLSA cannot be applied to publicly owned local mass transit since, even if public transit is not a traditional function, these requirements are not severable from the unconstitutional provisions of the statute. This Court may rely on this alternative argument to grant APTA's Motion to Affirm even though it was not the ground relied on by the lower court. *See Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975).

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[39] *National League of Cities* eviscerated coverage for what is currently 73 percent of state and local government employees. *SAUS: 1982-83*, Table 501 at 303.

CONCLUSION

The district court correctly concluded that, like protected activities expressly mentioned in *National League of Cities*, publicly owned local transit services are "important governmental activities," 426 U.S. at 847, which are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851 (footnote omitted). Indeed, these are precisely the kinds of public welfare services that "States have traditionally afforded their citizens." *Id.* Since this Court has held, and repeatedly confirmed, that the precise federal regulation at issue here impermissibly interferes with an essential attribute of state sovereignty—the power to fix wages and overtime compensation—and that as such it "endangers [the States'] 'separate and independent' existence," *LIRR*, 455 U.S. at 690 (*quoting National League of Cities*, 426 U.S. at 851), when applied to traditional governmental functions, it follows that publicly owned local mass transit, as a traditional governmental function, is exempt.

Accordingly, this Court should grant APTA's Motion to Affirm.

Only one Justice of this Court has suggested that *National League of Cities* should be overruled. *EEOC*, 103 S. Ct. at 1067 (Stevens, J., concurring). Substantial deprivation of decision-making authority by the hundreds of public agency members of APTA would result if the FLSA were applied to their activities. These public bodies also might be subject to tremendous back-pay and liquidated damage claims. *But cf., Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation* v. *Norris*, 51 U.S.L.W. 5243 (U.S. July 6, 1983). Therefore, should this Court not summarily affirm,

particularly if the reason is that, as appellants discuss, some other lower federal courts have found *contra* to the holding of the court below, APTA respectfully concurs with appellants' suggestion that the question is substantial and the case should be set for full briefing and oral argument on the merits.

Respectfully submitted,

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No. 82-1951

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS

REPLY MEMORANDUM FOR THE APPELLANT

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REPLY MEMORANDUM FOR THE APPELLANT

In our Jurisdictional Statement, we have explained that the decision of the district court holding the minimum wage and overtime provisions of the Fair Labor Standards Act unconstitutional as applied to publicly owned transit systems works an unwarranted extension of the doctrine of Tenth Amendment immunity articulated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and refined in subsequent cases. We have reviewed the traditional preeminence of private enterprise in the local transit industry, the growth in recent times of the public sector of the transit industry *through takeovers of pre-existing private systems*, the significant role of federal funding (especially capital assistance) in nurturing the trend toward public ownership, and the substantial edifice of federal regulatory legislation affecting transit employment, all of which set the public

transit industry apart from the services characterized as "traditional government functions" in *National League of Cities* itself.

In response, each appellee has filed a lengthy motion to affirm. Appellees take issue with our characterization of the history of the transit industry, the respective roles of the federal and local governments therein, and the contrasting history and patterns of government responsibility respecting the core government functions addressed in *National League of Cities*. But appellees recognize (APTA Mot. to Aff. 4 n.6; SAMTA Mot. to Aff. 5 n.3), however grudgingly, that the three courts of appeals that have considered the precise question in this case since *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1982), have, unlike the court below, upheld the application of the FLSA. Moreover, appellees' arguments reveal substantial differences between the parties (and between the appellees and the courts of appeals that have addressed the issue in this case) as to the proper reading of *National League of Cities*. In short, appellees' submissions themselves confirm that the question presented by the Jurisdictional Statement is of sufficient importance to warrant plenary consideration. Accordingly, we see no need for further briefing of that question at this stage of the proceeding. We therefore confine our reply to the alternative ground for affirmance advanced by appellees.

Although the court below did not reach this contention, appellees suggest (APTA Mot. to Aff. 27-28; SAMTA Mot. to Aff. 28-30) that this Court should summarily affirm the judgment on the ground that the FLSA is not severable, and that its wage and hour standards accordingly may not be enforced in any sector of public employment absent an amendment to the Act to limit its scope in conformity with

National League of Cities. Even if correct, this alternative contention would not support summary affirmance.[1] In any event, appellees' contention has no merit.

As the three-judge district court observed on remand in *National League of Cities*, the unusually broad severability clause in the FLSA, 29 U.S.C. 219, makes clear that Congress intended that the Act be enforced as to public employees to the extent permissible under this Court's decision. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D. D.C. 1977). The severability clause — which APTA blithely labels "a standard severability clause" (Mot. to Aff. 28) — is in fact far from mere boilerplate, and unequivocally resolves the severability question (29 U.S.C. 219 (emphasis added)):

> *If* any provision of this chapter or *the application of such provision to any person or circumstance is held invalid,* the remainder of this chapter and *the application of such provision to other persons or circumstances shall not be affected thereby.*

Because a finding of severability is favored, and the contrary finding is to be made only where "it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not" (*Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)), this clear expression of legislative intent is dispositive.

Appellees have not adduced any legislative history or other indication suggesting that Congress did not intend to

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[1]Appellees suggested summary affirmance on precisely the same alternative ground on the prior occasion when this case was here for review. 81-1728 & 81-1735 SAMTA Mot. to Aff. 25-28; 81-1723 & 81-1735 APTA Mot. to Aff. 28-29. The Court instead vacated and remanded for reconsideration in light of *Long Island R.R.*, 457 U.S. 1102 (1982).

be taken at its word. To the contrary, Congress's intention to apply the provisions of the FLSA to employees of public transit agencies, notwithstanding the constitutional limits on its power to afford such coverage to some other classes of public employees, is especially clear, because (as explained at pages 2-4 of our Jurisdictional Statement) coverage under certain provisions of the FLSA was afforded to public transit employees in 1966, prior to the general extension of coverage to most public employees in 1974.[2] And the extension of overtime coverage to the operating employees of public transit companies in 1974 was effected by provisions of the 1974 FLSA amendments separate from those at issue in *National League of Cities* v. *Usery* (see J.S. 4). Indeed, even after enactment of the 1974 FLSA amendments, the provisions of the Act embracing public transit employees are distinct from those embracing other public employees. See 29 U.S.C. 203(r)(2) and (3). Thus, appellees' contention that what remains after severance "is not a 'fully operative' and 'workable administrative machinery' " (APTA Mot. to Aff. 28, quoting *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 13) or would "create a program different from the one Congress actually adopted" (SAMTA Mot. to Aff. 30) ignores Congress's deliberate determination to the contrary.[3]

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[2]For this reason, SAMTA's assertion (Mot. to Aff. 30) that Congress relied on *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), "when it extended the FLSA to the entire public sector" is simply irrelevant to this case.

[3]*Sloan* v. *Lemon*, 413 U.S. 825 (1973), upon which appellees rely (SAMTA Mot. to Aff. 29; APTA Mot. to Aff. 28), does not support their contentions. In *Sloan* the Court declined to sever a state statute providing for reimbursement of private school tuition, which had been held to violate the Establishment Clause because of its primary and intended effect of advancing religion, so as to preserve its benefit for parents of children attending nonsectarian schools. But the Court's conclusion that to sever that particular statute would "create a program quite different from the one the legislature actually adopted" (*id.* at 834) cannot be divorced from the Court's determination that the statute's

Appellees' argument rests, moreover, upon the incorrect premise that this case presents a conventional severability issue arising from the invalidation on constitutional grounds of discrete provisions of the FLSA. But in *National League of Cities* v. *Usery, supra*, this Court did not hold any provision of the FLSA unconstitutional on its face, but merely held that the provisions of the 1974 amendments to the Act that covered public employees generally were unconstitutional as applied in certain circumstances. 426 U.S. at 852 ("We hold that *insofar* as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3" (emphasis added; footnote omitted)).Thus, this Court's decision itself clearly contemplated that the FLSA would remain enforceable in all other circumstances. Appellees' argument, if accepted, would largely obliterate the distinction between adjudications of facial unconstitutionality and decisions invalidating a statute as applied.

"intended consequence is to preserve and support religion-oriented institutions" (*id.* at 832). Here, by contrast, there is every indication that Congress's purpose to extend FLSA protection to transit workers was an objective distinct from the protection of public employees generally. And the entire history of the FLSA reflects Congress's interest in extending wages and hours protection incrementally to discrete groups of wage earners based upon the particular attributes of their employers. See, *e.g., National League of Cities* v. *Usery, supra*, 426 U.S. at 837-839; *Maryland* v. *Wirtz, supra*, 392 U.S. at 185-187. Thus, the analysis of *Sloan* is entirely consistent with enforcement of the FLSA to provide minimum wage and overtime protection to public transit workers. In any event, the severability clause at issue in *Sloan* was markedly less explicit than the provision at issue here. See 413 U.S. at 833 n.10.

For the foregoing reasons and the reasons stated in the Jurisdictional Statement, it is respectfully submitted that probable jurisdiction should be noted.

REX E. LEE
Solicitor General

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Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,
Appellant,
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,
v.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

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BRIEF OF APPELLANT JOE G. GARCIA

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QUESTION PRESENTED

May the minimum wage and overtime provisions of the Fair Labor Standards Act constitutionally be applied to employees of a publicly owned and operated mass transit system?*

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* The parties to this action are Joe G. Garcia and Raymond J. Donovan, Secretary of Labor of the United States, plaintiffs in the court below and the San Antonio Metropolitan Transit Authority, and the American Public Transit Association, defendants in the court below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1913 & 82-1951

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

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BRIEF OF APPELLANT JOE G. GARCIA

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is reported at 557 F. Supp. 445 and is reproduced in the Appendix to Appellant Garcia's Jurisdiction Statement in No. 82-1913 (hereafter "J.S.") at pp. 1a-18a. The prior judgment of the District Court, reproduced at J.S. 23a-24a, is not officially reported, but appears at 25 Wage and Hour Cases (BNA) 274.

JURISDICTION

This is a declaratory judgment action instituted by the appellee, San Antonio Metropolitan Transit Authority ("SAMTA"), against the Secretary of Labor, alleging that the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), may not, by virtue of the Tenth Amendment, constitutionally be enforced against SAMTA. Subject matter jurisdiction is founded on 28 U.S.C. §§ 1331 & 1337.

The judgment of the District Court declaring that the Secretary of Labor may not constitutionally apply or seek to enforce the FLSA against SAMTA or any other local public mass transit system has an effective date of February 14, 1983 and was entered on February 18, 1983. (J.S. 19a-21a.) Appellant Garcia filed a notice of appeal on March 16, 1983. (J.S. 22a.) On April 25, 1983, Justice White entered an order extending the time for filing a Jurisdictional Statement to and including June 1, 1983. On that date Appellant Garcia filed a Jurisdictional Statement invoking the jurisdiction of this Court under 28 U.S.C. § 1252. (*See, e.g., Donovan v. Richland County Assn.*, 454 U.S. 389 (1982).) On October 3, 1983, this Court noted probable jurisdiction in this appeal and in an appeal by the Secretary of Labor from the same judgment (No. 82-1951), and consolidated the cases (—— U.S. ——, 52 L.W. 3261.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, § 8 of, and the Tenth Amendment to, the Constitution of the United States; and the Fair Labor Standards Act. These constitutional and statutory provisions are reproduced in pertinent part in an appendix to this brief.

STATEMENT OF THE CASE

I. The Factual Background

Prior to May 1, 1959 mass transit service in San Antonio was provided by the San Antonio Transit Company ("SATC"). On May 1, 1959 the City of San Antonio created the San Antonio Transit System ("SATS") and bought SATC. Appellee San Antonio Metropolitan Transit Authority ("SAMTA") became the successor to SATS on March 1, 1978.[1]

During its first decade of operations, SATS was a money-making venture whose operations were governed by the terms of a revenue bondholders' indenture.[2] In 1969, however, the system experienced an operating loss for the first time in its history as F. Norman Hill, general manager of SATS, advised the Subcommittee on Housing of the House Committee on Banking and Currency on March 10, 1970.[3]

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[1] SAMTA is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. Art. 1118x (Vernon Cum. Supp. 1981) to serve the San Antonio metropolitan area. The City Council of San Antonio created VIA Metropolitan Transit to carry out SAMTA's business. VIA purchased the facilities and equipment of SATS from the City of San Antonio as of March 1, 1978 and commenced operations on that date.

[2] The National Bank of Commerce of San Antonio, acting as the bondholders' trustee, was the depository for all of SATS' revenues and would release monthly operating funds to the System in accordance with an annual budget. As of March 1, 1978, when SAMTA assumed transit operations, the bonds were paid in full.

[3] Mr. Hill, was speaking on behalf of the American Transit Association in support of H.R. 1626. That bill (*see* 116 Cong. Rec. 5785 (1970)) was one of several introduced that session "to provide long-term financing for expanded urban mass transportation programs, and for other purposes." Compare the preamble to the Urban Mass Transportation Act of 1970, P.L. 91-453, which, in part, amended the Urban Mass Transportation Act of 1964, P.L. 88-365, 49 U.S.C. §§ 1601 *et seq.* The significance of that Act for this case is discussed at pp. 17-18, 20-21, *infra*.

Later that year SATS received a capital grant from the Urban Mass Transit Administration in the amount of $4,122,666.[4] Over the next 10 years SATS and its successor, SAMTA, received $51,689,000 in federal capital and operational grants.

II. The Proceedings In This Case

In 1979, in response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, the Wage and Hour Administration of the Department of Labor rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WII-499, dated September 17, 1979, reprinted in Wage Hour Manual (BNA) 91: 1138-1140.) (*See also* § 775.3(b) of the FLSA regulations (Code of Federal Regulations, Title 29, Part 775), which includes "local mass transit systems" in a list of "functions of a State or its political subdivision [that] are not traditional" (44 Fed. Reg. 75628).)

On November 21, 1979, SAMTA filed this action for a declaratory judgment against the Secretary of Labor seeking a determination that SAMTA is exempt from the provisions of the FLSA.[5] SAMTA moved for summary judgment asserting that under *National League of Cities v. Usery*, 426 U.S. 833 (1976), the FLSA "cannot be constitutionally applied to it." Alternatively, SAMTA argued that the *National League of Cities* decision precludes enforcement of the FLSA against any state or

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[4] Project No. TX03005, approved December 23, 1970.

[5] On that same date appellant Joe G. Garcia, and fellow employees, instituted an action in the district court against SAMTA for overtime pay under the FLSA. (*Garcia v. SAMTA*, SA 79 CA 458.) That suit was stayed pending disposition of the constitutional challenge herein. Garcia was thereafter granted leave to intervene as a defendant in this suit and the American Public Transit Association was permitted to intervene as a plaintiff.

local governmental body in the absence of a congressional reenactment of a constitutionally valid amendment to that Act. The Secretary of Labor thereafter filed a motion for partial summary judgment.

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment, finding that "local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional functions . . . and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act. . . ." (J.S. 24a.) Consequently, the Department of Labor's classification of a public mass transit system as not constitutionally immune from application of the FLSA (29 CFR § 753(b)(3)) was held to be "null and void." (J.S. 24a.) On January 19, 1982, the District Court stayed, pending an appeal, the portion of its judgment enjoining the Secretary of Labor from applying or seeking to enforce the FLSA against all public mass transit systems in the nation.

Garcia and the Secretary of Labor each appealed to this Court (Nos. 81-1728 and 81-1735). On June 7, 1982, this Court entered an order (457 U.S. 1102) vacating the judgment of the District Court and remanding the case for further consideration in light of *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982).

On remand, the District Court, after receiving briefs from the parties, reaffirmed its original decision and reentered summary judgment in favor of SAMTA and the American Public Transit Association. (J.S. 1a-18a.)

SUMMARY OF ARGUMENT

The question in this case is whether the Tenth Amendment precludes Congress from requiring state-owned transit systems to comply with the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). The answer to that question depends on "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 686-87 (1982) ("*UTU*"). *See* pp. 9-11, *infra*.

In *UTU*, this Court answered that question in the negative with respect to federal regulation (through the Railway Labor Act) of the employment relationships of a state-owned railroad. The three factors that led the Court to that conclusion in *UTU*, *see* 455 U.S. at 685-90, are equally applicable here. First, the operation of a transit system is a "business enterprise." Second, it is a type of business enterprise that "has traditionally been a function of private industry, not state or local governments." And third, the States entered the mass transit field "with full awareness that it was subject to federal regulation" and have "operated under federal regulation for . . . years without claiming any impairment of [their] traditional sovereignty." Thus, here, as in *UTU*, it cannot be said that application of the FLSA to public transit systems will threaten the "separate and independent existence" of the States. *See* pp. 11-12, 14-19, *infra*.

Indeed, in these circumstances to hold that the States are immune from federal regulatory authority would create a powerful incentive for transferring business enterprises from private to public ownership. When transit systems were privately owned and operated those businesses, like all private businesses engaged in interstate

commerce, were subject to federal regulation, including, *e.g.*, the provisions of federal labor law. Those regulations generally impose costs on the operation of private businesses in the interest of achieving other social objectives. If those costs could be avoided by state acquisition of the business it would become economically advantageous, at least in the short run, for the States to acquire and operate private businesses. Yet plainly it was not the intent of the Tenth Amendment to foster a state takeover of the provision of goods and services. *See* pp. 18, 19-20, *infra*.

There is one additional factor here that makes it especially inappropriate to allow the States' entry into the transit field to defeat federal regulatory authority: the role the federal government has played in promoting that entry. Pursuant to the Urban Mass Transit Act of 1964, 49 U.S.C. §§ 1601 *et seq.* ("UMTA") the federal government has spent over $18,000,000,000 in financing state acquisition of mass transit systems as well as contributing heavily towards the capital and operating expenses of such systems. Thus, public transit systems are cooperative efforts of the federal government and the States. And, as the Sixth Circuit has stated, "[i]t would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations." *Dove v. Chattanooga Area Reg. Transp. Auth.*, 701 F.2d 50, 53 (6th Cir. 1983). *See* pp. 20-21, *infra*.

Finally, the conclusion that federal regulation here will not threaten the "separate and independent existence" of the States accords with the constitutional values at stake. There is a tension between the value underlying the Supremacy Clause—which is protective of federal sovereignty—and the value underlying the Tenth Amendment—which is protective of state sovereignty. The ac-

commodation required by *National League of Cities* and its progeny is to limit federal authority *only* to the extent necessary to preserve the essence of state sovereignty.

State sovereignty is most directly expressed in the State's law-making and law-enforcement powers, not in the State's provision of particular goods and services. Indeed, a State's decision to undertake a particular service—including transit services—ordinarily reflects the play of economic forces which can and do vary from time to time and from place to place. For this reason, it is appropriate to approach with great skepticism any claim that State sovereignty will be compromised by federal regulation of a state-provided service. And where, as in *UTU* and as in this case, the service traditionally has been regarded as a business, performed predominantly by private enterprise, and regulated by the federal government, that activity—when performed by a State—is not an "essential[] of state sovereignty" and is not one to which federal sovereignty must yield. *See* pp. 22-25, *infra*.

ARGUMENT

THE TENTH AMENDMENT DOES NOT PRECLUDE CONGRESS FROM REQUIRING STATE-OWNED TRANSIT SYSTEMS TO COMPLY WITH THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

A. The question in this case is whether the Tenth Amendment precludes Congress from requiring state-owned transit systems to comply with the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). That question is to be answered by applying the "three-prong test" that this Court has developed for "evaluating claims under *National League of Cities* [*v. Usery*, 426 U.S. 833 (1976)]." *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684 (1982) (hereinafter "*UTU*"):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." [*Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 287-88 (1981) (emphasis in original) (hereinafter "*Hodel*"), *quoted in UTU*, 455 U.S. at 684. *See also FERC v. Mississippi*, 456 U.S. 742, 763-64 n.28 (1982); *EEOC v. Wyoming*, —— U.S. ——, 51 L.W. 4219, 4222 (March 2, 1983)] [6]

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[6] Moreover, the *Hodel* Court added:

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce clause action will succeed. There are situations in which the nature of the federal interest advanced

There is no dispute that insofar as it applies to public single-state transit authorities, the FLSA "regulates the 'States as States.'" Furthermore, *National League of Cities* establishes that the fixing of wages and hours for public employees is "indisputably [an] 'attribute[] of state sovereignty.'" Thus, this case turns on the third inquiry *Hodel* directs: whether it is apparent that federal regulation of the wages and hours of public transit employees "would directly impair th[e States'] ability 'to structure integral operations in areas of traditional governmental functions.'"

By its terms the third *Hodel* factor requires that a line be drawn between "integral operations in areas of traditional governmental functions" and other state operations. The Court has had only one occasion to begin the process of drawing that line—the *UTU* case for which the instant case was remanded for reconsideration. We thus begin our analysis by reviewing that decision's rationale.

B. The question in *UTU* was "whether the Tenth Amendment prohibits application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce." 455 U.S. at 680. That Act provides railroad employees with extensive protections in their dealings with their employers, and places corresponding limitations on the scope of managerial authority to determine unilaterally the terms and conditions of employment for railroad employees—limitations far greater than those imposed by the FLSA whose application had been at issue in *National League of Cities* (and is at issue here). Yet notwithstanding that fact, the Court in *UTU* held that Congress is constitutionally permitted to apply the Railway Labor Act to state-owned railroads. In reaching that conclusion the Court reasoned as follows.

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may be such that it justifies state submission. [*Hodel*, 452 U.S. at 288 n.29; *see also UTU*, 455 U.S. at 684 n.9; *FERC v. Mississippi*, *supra*, 456 U.S. at 763-64 n.28; *EEOC v. Wyoming*, *supra*, 51 L.W. at 4222.]

The Court began by explaining that the concern underlying *National League of Cities* is that "federal power to regulate commerce . . . not be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 686. Given that concern, *UTU* concluded that *Hodel's* focus on "integral operations in areas of traditional governmental functions" is to be understood "to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" 455 U.S. at 686-87, *quoting National League of Cities*, 426 U.S. at 851. Only where the federal regulation would have such an effect is the third prong of the *Hodel* test met and does the Tenth Amendment preclude federal regulation.[7]

In concluding in *UTU* that the test is *not* satisfied with respect to state-owned railroads the Court pointed to three factors. First, the Court noted that in operating a railroad the State is engaged in "the running of a business enterprise":

> The *National League of Cities* opinion focused its delineation of the "attributes of sovereignty" . . . on a determination as to whether the State's interest involved "functions essential to separate and independent existence." [426 U.S. at 845] *quoting Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911). It should be evident . . . that the running of a business enterprise is not an integral operation in the

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[7] *See also EEOC v. Wyoming, supra*, 51 L.W. at 4222 (citations omitted):

> The principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a "separate and independent existence," not be lost through undue federal interference in certain core state functions.

> area of traditional government functions. [455 U.S. at 685 n.11, *quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422-24 (Burger, C.J. concurring)]

Second, the Court emphasized that the "operation of passenger railroads" is not just a business enterprise but one that "has traditionally been a function of private industry, not state or local governments." 455 U.S. at 686. The Court recognized that "some passenger railroads have come under state control in recent years," *id.*, but the Court viewed that fact as irrelevant because it

> does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state. [*Id.*; emphasis in original]

Finally, the *UTU* Court stressed the long history of "comprehensive federal regulation of the [railroad] industry." 455 U.S. at 687. The Court noted that "[h]ere the State acquired the Railroad with full awareness that it was subject to federal regulation under the Railway Labor Act" and the State "operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty." *Id.* at 690. Given these facts the Court concluded:

> It can thus hardly be maintained that application of the Act to the State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities v. Usery*, 426 U.S., at 851. [455 U.S. at 690]

It would appear—although *UTU* does not address the issue in terms—that each of the three factors the Court looked to is of independent significance in determining whether federal regulation "would be likely to hamper the state government's ability to fulfill its role in the

Union and endanger its 'separate and independent existence'." 455 U.S. at 686. For the States' existence is unlikely to be threatened where the federal government regulates a state-owned "business enterprise" *or* where the federal regulation is of an activity that traditionally has been performed by the private sector *or* where the federal regulation of that activity is long-standing. In *UTU*, however, all three factors were present. And where that is true, there is an especially powerful reason, suggested in *UTU*, for sustaining the federal regulation.

If a State, by acquiring a private business enterprise were, by virtue of the Tenth Amendment, to gain an immunity from established federal regulatory authority, the Tenth Amendment would create a powerful incentive for transferring business enterprises from private to public ownership. Federal regulation, in the interest of other social objectives, normally imposes costs on the operation of a business, as the instant case and *UTU* both illustrate. If those costs could be avoided by state acquisition of the business, it would become economically advantageous at least in the short run for the States to acquire (using eminent domain powers if necessary) and operate business enterprises free of the federally-imposed costs. Yet plainly, the Tenth Amendment was not intended to encourage a state take-over from the private sector of the provision of goods and services. Thus, as the Court concluded in *UTU*:

> Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. [455 U.S. at 687]

C. The instant case cannot be meaningfully distinguished from *UTU*. For as we proceed to show, state-owned mass transit systems—like state-owned railroads—

are business enterprises that have been traditionally operated by private industry and that have been traditionally subject to federal regulation. For each of these reasons, continued application of the federal regulation to these enterprises—now owned by the State rather than a private party—will not "endanger the States' 'separate and independent existence.'" And as in *UTU* "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority."

1. At the threshold, the service at issue in this case is remarkably similar to the service involved in *UTU*. In that case, "[b]y far the bulk" of the state-owned railroad's business was "carrying commuters between Long Island's suburban communities and their places of employment in New York City." 455 U.S. at 680 n.1. Here, of course, SAMTA performs a similar function—albeit using buses rather than trains—in the San Antonio metropolitan area; as SAMTA stated in its Motion to Affirm (at 7), "[i]t is estimated that at least two-thirds of all passengers riding SAMTA's regular-line service buses are travelling to or from school or their jobs." It would be surprising, indeed, if the Tenth Amendment draws a constitutional distinction between transporting commuters by bus as opposed to by train.

2. *UTU* recognizes that a state-owned commuter passenger railroad no less than any other railroad is a "business enterprise." 455 U.S. at 686-86. The same is true of all state-owned transit systems. Mass transit operates on a fee-for-service basis; those who cannot afford the fee cannot avail themselves of the service. This means of allocating useful goods and services is, of course, the very hallmark of the market system. This feature distinguishes state-owned mass transit systems from, *e.g.*, state-owned schools, police departments, or fire departments which are public precisely in that each is available to *all* members of the public without regard to economic means. Because mass transit services are sold by

the State rather than delivered—generally in competition with other means of transportation—public mass transit is, in essence, a business. *See Helvering v. Powers*, 293 U.S. 214, 227 (1934). And to repeat the words of *UTU*, "[i]t should be evident that the running of a business enterprise is not an integral operation in the area of traditional government functions." 455 U.S. at 685 n.11.

We recognize, of course, that transit systems are presently subsidized both by the federal government (*see* p. 20, *infra*) and also by the State governments; approximately 50% of operating costs are now paid by such subsidies.[8] But the railroad in *UTU* also was state-subsidized and yet was deemed by the Court to be a "business enterprise"; indeed the State had acquired that railroad only after "a period of steadily growing operating deficits," 455 U.S. at 680, and the record in *UTU* revealed that state subsidies accounted for 50% of the railroad's gross income, Joint Appendix in No. 80-1925 at 277-78. Furthermore, there are a host of purely private entities that are governmentally-subsidized to a greater or lesser degree (either through direct grants or tax exemptions) but that indisputably are business enterprises (farms provide perhaps the most prominent example). Thus, the existence of state (and federal) subsidies for mass transit cannot defeat the conclusion that this is a business and hence not an "integral operation in the area of traditional government functions."

3. As in *UTU*, the "historical reality" here, as the District Court found, "*is* not one of predominantely [*sic*] public ownership and operation of transit services." J.S.

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[8] Feinsod Affidavit ¶ 7. This is a quite recent development: as of 1970 (by which time public transit was well established, *see* APTA, *1981 Transit Fact Book* at 43), revenues from fares covered 90% of operating costs. C. Krouse, "Existing Revenue Sources" *in* American Society of Civil Engineers, *Proceedings of the Speciality Conference on Urban Transportation Financing* at 48 (1979).

4a (emphasis in original). Rather, as appellee American Public Transit Association stated in its 1978-79 *Transit Fact Book* (at 55), "[p]ublic ownership of transit is a recent development." As of 1940, for example, it was almost as rare for a State to own a transit system such as SAMTA as a commuter railroad such as the Long Island; there were only 20 public transit systems in the entire nation (2% of such systems) and those systems accounted for only 7% of all transit vehicles. As late as 1960, state-owned transit systems still were the relatively infrequent exception rather than the rule; there were only 58 public systems (5% of the total) and those systems accounted for approximately 33% of all transit vehicles. APTA, 1981 *Transit Fact Book* at 43.[9]

In the past two decades, there has been a substantial trend towards state acquisition and ownership of mass transit systems (funded, in substantial part, by the federal government, *see* pp. 17-18, 20, *infra*); the number of publicly-owned systems increased from 58 in 1960, to 159 in 1970, to an estimated 576 in 1980. *Id.* These public systems now account for an estimated 90% of the transit vehicles. *Id.* But as in *UTU* this "recent development" (to quote again from appellee APTA's *Fact Book*) cannot "alter the historical reality": the operation

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[9] Notwithstanding *UTU*'s emphasis on the tradition of private ownership in that case, the district court here minimized the significance of the tradition of privately-operated transit systems, emphasizing instead the history of state regulation of transit systems. J.S. 3a-5a. *UTU* cannot be so distinguished, for railroads also have long been subject to state regulation. *See, e.g., Chicago, R.I. & P.R. Co. v. Arkansas*, 219 U.S. 453 (1910) ("full crew" law); *Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423 (1966) (same); *Smith v. Alabama*, 124 U.S. 465 (1887) (licensing engineers who operate trains within the state); *Nashville, Etc. Railway v. Alabama*, 128 U.S. 96 (1888) (requiring engineers to obtain a certificate of fitness with regard to color-blindness and visual powers); *N.Y., N.H. & H. Railroad v. New York*, 165 U.S. 628 (1896) (regulating the heating systems of passenger cars).

of buses "is not among the functions *traditionally* performed by state and local governments." *UTU*, 455 U.S. at 686.

4. As in *UTU*, the States entered the mass transit field in a substantial way "with full awareness that it was subject to federal regulation" and the States have "operated under federal regulation for . . . years without claiming any impairment of [their] traditional sovereignty." 455 U.S. at 690. The federal regulation of transit systems at the time the States entered this field in large numbers took two discrete forms.

First, in 1964 Congress enacted the Urban Mass Transit Act, 49 U.S.C. §§ 1601 *et seq.* ("UMTA"), which "was designed in part to provide federal aid for local governments in acquiring failing private transit companies." *Jackson Transit Authority v. Transit Union*, 457 U.S. 15, 17 (1982). In enacting that law Congress decided to "protect[] workers affected as a result of adjustments in an industry carried out under the aegis of Federal law." H.R. Rep. No. 204, 88th Cong., 1st Sess. 15 (1963); S. Rep. No. 82, 86th Cong., 1st Sess. 12 (1963). Consequently, § 10(c) of UMTA as originally enacted—now § 13(c), 49 U.S.C. § 1609(c)—imposes certain requirements on UMTA grantees with respect to their employment relationship with transit employees.

In particular, § 13(c) provides that a State that receives UMTA assistance and acquires a transit system, must "protect[] individual employees against a worsening of their position with respect to their employment," and must "continu[e] collective bargaining rights" (even though the National Labor Relations Act as amended, 29 U.S.C. §§ 151 *et seq.*, does not apply to state employees). To this extent § 13(c) requires UMTA grantees, as a matter of federal law, to "accommodate state law to collective bargaining," *Jackson Transit Authority*, *supra*, 457 U.S. at 28, and thus to surrender what would otherwise be their unlimited managerial authority to fix the

terms and conditions of employment for transit employees.[10]

With rare exception, the States have elected to accept UMTA funds and to abide by these federal requirements. As of March, 1982, the Urban Mass Transit Administration had made a total of 2,547 capital grants; at least 382 cities and numerous rural areas—located in every State—have received UMTA funds.[11] Simply stated the States chose to enter the transit field with federal assistance, knowing that in so doing they would be subject to federally-imposed requirements.

In addition to UMTA's requirements, in 1966 Congress amended the FLSA, P.L. 89-601, so as to eliminate the "distinction between a public or private local transit

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[10] To be sure, as this Court held in *Jackson Transit Authority, supra*, § 13(c) does not "create a body of federal law applicable to labor relations between local governmental entities and transit workers" and § 13(c) does not "supersede state law." 457 U.S. at 27. But *Jackson Transit* makes clear that—as explained in text—there are federal obligations imposed by § 13(c) and that there are a variety of means of enforcing § 13(c)'s requirements against UMTA grantees. *See id.* at 29 n.15; *cf. Bell v. New Jersey*, —— U.S. ——, 51 L.W. 4647 (May 31, 1983).

[11] *See Hearings Before the Subcommittee on the Department of Transportation and Related Agencies Appropriations of the House Committee on Appropriations*, 97th Cong., 2d Sess. at 818-20; American Ass'n of State Highway and Transportation Officials, *Survey of State Involvement in Public Transportation* at 32-33 (1982). UMTA funds have been used by transit authorities to purchase 48,891 buses and 4,245 rapid rail transit cars and have been used to construct 311 miles of rapid rail transit track. *Hearings, supra.*

Although we have not been able to find any current data on the number of cities or States that have used UMTA funds to acquire a private mass transit company, as of the end of fiscal year 1975 a total of 115 cities had done so. Department of Transportation, *UMTA Statistical Profile* at Table 10 (1976). Furthermore, "[i]n a number of cities more than one transit property was acquired" with UMTA funding and thus the number of systems so acquired as of 1976 was "considerably higher." *Id.*

system," and provide that "all the employees of a public local transit system which qualifies as an enterprise engaged in commerce [are] covered by the minimum wage . . . provisions of the act." S. Rep. No. 1487, 89th Cong., 2d Sess. at 26-27 (1966). Thus, any State that acquired a transit system after 1966—and over 80% of public transit systems become public after 1966, *see* 1981 *APTA Transit Fact Book* at 43—did so knowing that Congress had manifested its intention to regulate the employment relationship between public transit systems and their employees, and specifically that Congress had made the minimum wage provisions of the FLSA applicable to such systems.

In sum, as in *UTU*, the States "knew of and accepted the federal regulation" in acquiring mass transit systems and have "operated under" that regulation for years. "It can thus hardly be maintained that application of the [FLSA] to the State's operation of [a transit system] is likely to impair the State's ability to fulfill its role in the Union or to endanger the [State's] 'separate and independent existence.' " 455 U.S. at 690.

5. Finally, the ultimate point made in *UTU* is equally applicable here: "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." 455 U.S. at 687. Until the States entered the mass transit field, the labor relations of transit companies were governed by the National Labor Relations Act; indeed, in *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951), this Court specifically upheld the applicability of that Act to mass transit companies. *See also Bus Employees v. Missouri*, 374 U.S. 74 (1962). To hold that State acquisition of transit company ends not only NLRA regulation (because the NLRA, by its terms, does not apply to the States) but also eliminates the federal power to regulate in any respect the employment

relations of such companies would, as previously explained, create an impetus towards state acquisition of private enterprises—an impetus that cannot be attributed to the Tenth Amendment's framers.

There is one additional factor here that makes it especially inappropriate to allow the States' entry into the transit field to defeat federal regulatory authority: the role the federal government has played in promoting that entry. As previously stated, mass transit systems generally were owned and operated by private parties as of 1960 (p. 16, *supra*). In 1964, Congress enacted UMTA and made federal money available for, *inter alia*, state acquisition of private transit companies or state development of transit operations. As the Third Circuit wrote in *Kramer v. New Castle Transit Authority*, 677 F.2d 308 (C.A. 3 1982), *cert. denied*, —— U.S. ——, 51 L.W. 3533 (Jan. 17, 1983):

> The UMTA put inexorable forces in motion whereby, at an accelerated pace, transportation companies changed hands from the private sector to the public sector. . . . The federal government is actively involved in local mass transportation. It provides: (1) capital grants, funded on a "80% federal/20% local" matching basis, (2) operating grants, on a "50% federal/50% local" matching basis; and (3) technical assistance to state and local planning agencies on an "80% federal/20% local" matching basis. [*Id.* at 309-310]

Through UMTA, over $18,000,000,000 in federal money has been funneled to the States for mass transit. *Hearings, supra* n.11, at 818.

The *Kramer* court drew the following lesson:

> [*UMTA's*] *result has been a network of publicly run systems which are cooperations between the federal government and the states.* The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important

> federal role in the matter. The Authority cannot recast this development as one is which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. . . . There is . . . no tradition of the states *qua* states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal au-authority in this area. [677 F.2d at 310, emphasis added, footnote omitted.]

Two other courts of appeals have unanimously agreed with the Third Circuit's reasoning and conclusion. In *Alewine v. City Council*, 699 F.2d 1060, 1069 (C.A. 11 1983) much of the foregoing passage was quoted with approval. And in *Dove v. Chattanooga Area Reg. Transp. Auth.*, 701 F.2d 50 (C.A. 6 1983), the court observed:

> In this case, a traditionally private service has become predominantly a public service due to federal aid. *Kramer*, 677 F.2d at 309-10. In such a case, the concerns stated in *National League of Cities* are not implicated. *It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations.* [701 F.2d at 53, emphasis added] [12]

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[12] In *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (C.A. 9 1983), the Ninth Circuit followed similar reasoning to conclude that the Tenth Amendment does not bar application of the FLSA to state-employed "chore workers" who were paid through a federal-state program to perform for aged and disabled individuals a wide variety of domestic tasks which "have been traditionally performed by domestic employees in the private sector," *id.* at 1472. That court concluded:

> A program that is set up at the behest of the federal government, and that continues to be regulated and funded in large part by the federal government, is unlikely to be a function

D. The parallels between *UTU* and this case are, we believe, sufficient to demonstrate that the result in both cases must be the same. But we venture a few words more on why the constitutional values at stake require that result.

The fundamental premise—the constitutional value—on which *National League of Cities* and its progeny rest is that "'[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'" 426 U.S. at 844, *quoting Texas v. White*, 7 Wall. 700, 725 (1869). The conclusion drawn from that premise is that "our federal system of government imposes definite limits on the authority of Congress to regulate the activities of the States as States," 426 U.S. at 842, in order to protect "the States' 'separate and independent existence,'" 426 U.S. at 851, *quoting Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911). As the Court stated just last Term, "the imposition of certain federal regulations on state governments might, if left unchecked 'allow "the National Government [to] devour the essentials of state sovereignty."'" *EEOC v. Wyoming*, *supra*, 51 L.W. at 4222.

It is equally true, however, that "the Constitution, in all its provisions, looks to an indestructible *Union*" based on a federal government whose laws, enacted pursuant to such grants of authority as the Commerce Clause, are by the force of the Supremacy Clause "the supreme Law of the Land." Consequently, any Tenth Amendment "check" on federal authority necessarily "devour[es]" a part of the federal government's sovereignty. *National League of Cities*, *Hodel*, and *UTU* resolve this tension by limiting

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integral to the state's "separate and independent existence." Such a program is, in fact, a joint federal and state undertaking. It is unlike such functions as police protection, control over which is essential to a state's status as an independent government unit. Federal regulation of the chore worker program through the Commerce Clause poses no significant threat to state sovereignty. [*Id.*]

federal authority *only* to the extent necessary to preserve "the essentials of state sovereignty."

There is, we submit, only one area of state action that is clearly an "essential[] of state sovereignty"—state law-making and law-enforcement. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, *supra*, 456 U.S. at 761. "It would follow that the ability of a state legislative (or . . . administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system." *Id.* Thus, a federal law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program," *Hodel*, *supra*, 452 U.S. at 288, *quoted in FERC v. Mississippi*, *supra*, 456 U.S. at 764-65, is perhaps the clearest example of federal action interdicted by the *National League of Cities* rule.

Law-making and law-enforcement are unique in that the people have granted the government, as their representative, the *exclusive authority* to engage in those activities for the polity as a whole. Government provision of goods and services stands on a very different footing. Neither political theory nor actual practice provides a certain guide as to whether a particular good or service should be or will be provided in whole or in part by the government. Rather, it appears that state provision of a service is more often the product of economic forces that vary from place to place and from time to time than an assertion by the States of their role as sovereigns in the Union.

The precipitous decline of private mass transit and rise of public mass transit makes the point well. These developments do not appear to represent a new understanding of state sovereignty but rather the attraction of relatively low-cost, efficient automobile transportation

(operating on roads constructed and maintained by the government) during relatively affluent times—an attraction that has undermined the competitive position of mass transit in the *current* marketplace. But in a dynamic economy that attraction could well be transient and if so the private sector may again view mass transit as a sound investment. There is, therefore, no reason to believe that the current balance between public and private mass transit will continue of its own force or should to any extent be maintained by an artificial cost advantage accorded to public mass transit.[13]

Similar market forces may at any time lead the States to take on a larger role in the provision or distribution of food, gas, electricity or other necessities of modern life, or a smaller role in providing services that are now "public." So long as the dictates of the Taking Clause are observed we know of nothing in the Constitution that prevents a State from moving as far along the road to democratic socialism in its best sense as the people of that State determine to go. But because economic considerations have so heavy a weight in such determinations, it is, we submit, appropriate to approach with great skepticism any claim that state sovereignty will be compromised if a state-provided service were subject to federal regulation pursuant to the Commerce Clause

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[13] Mass transit ridership historically has been quite cyclical. In 1926, for example—following a period of sustained growth—mass transit ridership reached 17,201,000,000. Over the next decade, ridership declined by over 25%, bottoming out at 12,645,000,000 in 1938. During the depression and World War II ridership almost doubled, reaching a peak of 23,372,000,000 in 1946. Over the ensuing twenty-five years ridership again declined, this time by almost 70%, falling to 6,972,000,000 in 1975. But in 1975 ridership began to increase again, and as of 1980 was estimated at 8,228,000,000, an increase of over 15% in only five years. *See* U.S. Dept. of Commerce, *Historical Statistics of the United States From Colonial Times to 1970*, Series Q 235-250 (1976); U.S. Dept. of Commerce, *Statistical Abstract of the United States, 1982-1983* at 623.

whose very purpose is to provide for uniform national regulation of economic activity. And surely, where, as in *UTU* or as in this case, an activity has traditionally been regarded as a business, has traditionally been performed predominantly by private enterprise, and has traditionally been regulated by the federal government, that activity—when undertaken by a State—is not an "essential[] of state sovereignty" and is not one to which federal sovereignty must yield.

CONCLUSION

For the above stated reasons the decision below should be reversed.

Respectfully submitted,

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APPENDIX

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have power
>
> * * * * *
>
> To regulate Commerce . . . among the several States . . .;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. III) 203:

> As used in this chapter—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor

organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For the purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce,

or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. III) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE SECRETARY OF LABOR

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QUESTION PRESENTED

Whether, under the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the minimum wage and overtime provisions of the Fair Labor Standards Act may constitutionally be applied to the employees of a publicly owned and operated mass transit system.

PARTIES TO THE PROCEEDING BELOW

In addition to the appellee named in the caption, the American Public Transit Association is an appellee in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1913

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

No. 82-1951

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The amended opinion of the district court (J.S. App. 1a-20a) is reported at 557 F. Supp. 445.[1] A prior judgment order issued by the district court (J.S. App. 22a-24a) that was vacated by this Court (*Donovan* v. *San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982)) is unreported.

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[1] The district court issued a memorandum opinion and judgment on February 14, 1983, but it withdrew the opinion and judgment on February 18, 1983, and entered an amended opinion and judgment on that date. The court's February 18 order (J.S. App. 21a) recites that the amended judgment shall "be effective as of February 14, 1983." (Unless otherwise indicated, references to "J.S. App." are to the appendix to the jurisdictional statement in No. 82-1951).

JURISDICTION

The amended judgment of the district court (J.S. App. 25a-27a) was entered on February 18, 1983, effective February 14, 1983 (see note 1, *supra*). The federal appellant's notice of appeal to this Court (J.S. App. 28a-29a) was filed on March 3, 1983. Appellant Garcia's notice of appeal (82-1913 J.S. App. 22a) was filed on March 16, 1983. On April 25, 1983, Justice White extended the time for docketing the appeals to and including June 1, 1983. The jurisdictional statements of appellant Garcia and the federal appellant were filed on May 26, 1983, and June 1, 1983, respectively. Probable jurisdiction was noted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, and the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, are set forth in an appendix to this brief, *infra*, 1a-6a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.*, requires covered employers to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. (& Supp. V) 206(a)(1) and 207(a)(1).[2] The original version of the FLSA excluded states and their political subdivisions from the definition of an "employer" used in the minimum wage and overtime provisions; state and municipal employees accordingly were unprotected under these provisions of the Act. See 29 U.S.C. (1940 ed.) 203(d). In

[2] The Act also proscribes "oppressive child labor." 29 U.S.C. 212(c).

1966, Congress extended the coverage of the FLSA in various respects and eliminated the previously applicable exemption as to virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether operated for profit or on a nonprofit basis, that were deemed to be "[e]nterprise[s] engaged in commerce or in the production of goods for commerce." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(a), (b), and (c), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(1), 203(s)(4).[3] The constitutionality of this "enterprise concept" of coverage and of the inclusion of publicly operated schools, hospitals, and institutions under the Act was sustained in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).[4]

In addition to schools, hospitals, and institutions, the 1966 FLSA amendments extended coverage to employees of all transit companies "engaged in commerce" that are either publicly owned or privately owned but subject to state or local regulation. Pub. L. No. 89-601, § 102(a) and (b), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(2). However, the 1966 FLSA amendments did not provide overtime pay protection to drivers, operators, and conductors ("operating employees") employed by transit companies, public or private, brought under the Act. Pub. L. No. 89-601, § 206(c), 80 Stat. 836, 29 U.S.C. (1970 ed.) 213(b)(7).[5] The plaintiffs in *Mary-*

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[3] The effect of each of these provisions and their interrelationship is explained in *Maryland* v. *Wirtz*, 392 U.S. 183, 185-187 & n.4 (1968).

[4] The Court declined to consider, however, the statutory question whether publicly owned schools, hospitals and institutions characteristically are "engaged in commerce" and are, accordingly, subject to the minimum wage and overtime provisions of the Act, leaving that question open for case by case resolution. *Maryland* v. *Wirtz*, 392 U.S. at 200-201.

[5] In 1961, Congress had extended the FLSA to provide minimum wage and child labor (but not overtime) protection to employees of certain private mass transit operators. See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c) and 9, 75

land v. *Wirtz* did not challenge the public transit employee provisions of the 1966 FLSA amendments, and the Court had no occasion to consider their validity. See *Maryland* v. *Wirtz*, 269 F. Supp. 826, 827 (D. Md. 1967), aff'd, 392 U.S. 183 (1968).

In 1974, Congress again broadened the coverage of the FLSA. This time virtually all public agencies and their employees were brought within the ambit of the Act. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 6(a)(1), (4), (5)(D) and (E), and (6), 88 Stat. 58-60, 29 U.S.C. 203(d), 203(r)(3), 203(s)(5), and 203(x).[6] The 1974 amendments also established a schedule for phasing out the special exclusion from overtime coverage for operating personnel of transit systems that had been established in the 1966 (and 1961) amendments. Pub. L. No. 93-259, § 21(b)(1)-(3), 88 Stat. 68.

The provisions of the 1974 FLSA amendments applicable to public employment generally were broadly challenged by the states and their political subdivisions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court overruled *Maryland* v. *Wirtz*, and restricted Congress's power to extend the protections of the FLSA to public employees. The Court held that the "constitutional doctrine of intergovernmental immunity" (*id.* at 837) bars application of the minimum wage and overtime provisions of the FLSA to "the States *qua* States" (*id.* at 847), "insofar as the

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Stat. 65-66, 72, 73, 29 U.S.C. (1964 ed.) 203(s)(2), 213(a)(9), 213(b)(7). In 1966, § 203(d) was amended to bring state or local government operated transit systems within the Act's definition of "employer." Section 203(r)(2) was amended in 1966 to make clear that transit operations, whether public or private (but publicly regulated), are "enterprise[s]" within the meaning of the FLSA and, accordingly, that employees of a transit system engaged in commerce are entitled to the protections of the Act.

[6] These provisions and their combined effect are described in *National League of Cities* v. *Usery*, 426 U.S. 833, 838-839 (1976).

challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*id.* at 852).

In overruling *Maryland* v. *Wirtz*, the Court specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (426 U.S. at 855 (footnote omitted)). The Court also listed "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" as other examples of traditional state operations (*id.* at 851, 855). However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities * * * which are well within the area of traditional operations of state and local governments" and that accordingly may not be made subject to federal commerce power legislation, where other elements of the test for immunity are satisfied (*id.* at 851 n.16). Because the plaintiffs in *National League of Cities* did not mount a challenge to the public transit provisions of the 1966 and 1974 FLSA amendments, the Court had no occasion to address the constitutionality of those provisions of the Act.

Although the Court thus left unsettled the constitutional validity of federal legislation affecting certain state and local governmental functions, it made clear that not all state activity was insulated from the reach of federal commerce power enactments. Indeed, the Court singled out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities* v. *Usery*, 426 U.S. at 854 n.18 (quoting *United States* v. *California*, 297 U.S. 175, 182 (1936)). The Court explained that operation of a railroad was not a service "that the States have regarded as integral parts of their *governmental* activities" (426 U.S. at 854 n.18 (emphasis added)).

On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the court concluded that "[i]t may be appropriate to provide some protection to the state and local governments" (429 F. Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his statement of FLSA enforcement policy, 29 C.F.R. Pt. 775, so as to provide for listing of government activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall*, 429 F. Supp. at 706) and was published as an interpretative rule. See 29 C.F.R. 775.2(b) and (d) and 775.3(b). Pursuant to the approved procedure, on December 21, 1979, the Secretary of Labor amended his statement of enforcement policy to include local mass transit systems in the category of government activities not integral to a traditional government function and hence subject to the FLSA. See 29 C.F.R. 775.3(b)(3).

2. Appellee San Antonio Metropolitan Transit Authority (SAMTA), is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. art 1118x (Ver-

non Cum. Supp. 1982) to serve the San Antonio metropolitan area. SAMTA began operations on March 1, 1978, when it acquired the facilities and equipment of the city-owned San Antonio Transit System, which had begun operations in 1959.[7] Prior to 1959 public transportation in San Antonio was provided by a private transit company.

Since its establishment, SAMTA has received substantial federal financial assistance, in the form of grants in aid for capital improvements and operating expenses, as well as technical assistance, under the Urban Mass Transportation Act of 1964 (UMT Act), 49 U.S.C. (& Supp. V) 1601 *et seq.* During the first two fiscal years of SAMTA operations, UMTA provided non-capital grants of approximately $12.5 million, or 30% of SAMTA's total operating expenses.[8] SAMTA's predecessor, the San Antonio Transit System, had also received substantial federal financial aid prior to the SAMTA takeover.[9] During the period December 1970 through February 1980, SAMTA and its predecessors received $51,689,000 in federal grants, or approximately 40% of their total eligible projects costs of $130,922,194. Of this federal assistance, $31,040,080 represented capital grants

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[7] The San Antonio Transit System was operated pursuant to the restrictive terms of a revenue bondholders' indenture with a local bank serving as trustee (J.S. App. 7a n.4; *Urban Mass Transportation: Hearings on H.R. 6663, S. 3154, H.R. 7006 et al. Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 420 (1970) (statement of F. Norman Hill, Manager, San Antonio Transit System) (hereinafter cited as *1970 UMT Act Hearings*)).

[8] Brief in Support of SAMTA's Motion for Summary Judgment 10 (filed Apr. 30, 1980).

[9] It appears that the system met operating expenses and met its obligations to pay principal and interest on its bonds, to make payments in lieu of taxes to the City of San Antonio, and to establish various reserves, without any federal or local subsidy for the first 10 years of its existence (Aff. of Robert Thompson (June 12, 1980) ¶¶ 4-5 and Exh. A & B thereto; *1970 UMT Act Hearings* 420 (statement of F. Norman Hill)).

under Sections 3 and 5 of the UMT Act; $20,620,270 was operating assistance under Section 5; and $28,654 was technical assistance (research, development, and demonstration grants) under Section 6 of the UMT Act.[10]

3. On November 21, 1979, SAMTA filed a complaint in the United States District Court for the Western District of Texas seeking a declaratory judgment that its operations are integral operations of a political subdivision of the State of Texas in an area of traditional governmental functions, and accordingly are exempt, under the rule of *National League of Cities*, from both the minimum wage and overtime provisions of the FLSA.[11] The Secretary of Labor counterclaimed against SAMTA for enforcement of the overtime and record-keeping provisions of the Act. See 29 U.S.C. 217.[12]

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[10] Urban Mass Transportation Administration, Office of Management Information Systems, List of All Grants for the City of San Antonio, Texas (Feb. 25, 1980) (Exh. K to the federal appellant's motion for summary judgment).

In addition, as of 1979, SAMTA had received federal funding commitments for acquisition of 325 buses. Urban Mass Transportation Administration, Major Funding Commitments for Buses (Over 300 Units) Since Feb. 1965, as of Sept. 30, 1979 (Exh. L to the federal appellant's motion for summary judgment).

[11] In its complaint (¶¶ 4-6), filed just before the Secretary published his enforcement policy respecting mass transit (see page 6, *supra*), SAMTA alleged that the Secretary had informally concluded that mass transit operations were not within the sphere of intergovernmental immunity, and that employees of SAMTA had, on this basis, begun to assert a right to receive overtime compensation under the FLSA and had indicated their intention to seek remedial relief under the Act.

[12] SAMTA evidently paid its employees the minimum wage at the time in question. SAMTA's predecessor, the San Antonio Transit System, had paid overtime pursuant to the FLSA from the time the 1974 amendments to the Act went into effect until October 15, 1976, at which time employees were advised that a "recent decision by the Supreme Court of the United States" made it unnecessary for the System to continue to do so (Aff. of Robert Thompson (June 12, 1980) ¶ 13 and Exh. J thereto).

Appellee American Public Transit Association (APTA), a trade association of public transit operators, intervened as a plaintiff, supporting SAMTA, while appellant Joe G. Garcia, a SAMTA employee, intervened as a defendant, supporting the Secretary.

On November 17, 1981, the district court denied the Secretary's motion for partial summary judgment and entered judgment for SAMTA. The court issued no opinion, but its judgment stated (J.S. App. 23a) that local, publicly operated mass transit systems such as SAMTA "constitute integral operations in areas of traditional governmental functions" for purposes of applying the rule of *National League of Cities* v. *Usery*. The district court accordingly concluded that the Secretary may not enforce the minimum wage and overtime pay provisions of the FLSA against SAMTA and other public transit operators.

The Secretary and intervenor-defendant Garcia both appealed to this Court pursuant to 28 U.S.C. 1252. The Court vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1982). *Donovan* v. *San Antonio Metropolitan Area Transit Authority*, 457 U.S. 1102 (1982).

4. On remand, the district court adhered to its conclusion that the minimum wage and overtime provisions of the FLSA may not be applied to publicly owned and operated mass transit systems such as SAMTA (J.S. App. 1a-20a). Although the district court acknowledged that "the historical record *is not* one of predominately [*sic*] public ownership and operation of transit services" (J.S. App. 5a (emphasis in original)), it concluded that mass transit "has traditionally been a state prerogative and responsibility" (*id.* at 6a) because transportation related activities such as road building are a traditional public function (*id.* at 4a) and because private transit operations had generally been subject to state or local regulation (*id.* at 5a).

The district court recognized that, under *United Transportation Union* v. *Long Island R.R., supra,* the states cannot invoke Tenth Amendment immunity in circumstances where such immunity would "erode federal authority over previously private functions recently converted to public ownership" (J.S. App. 6a). But the court distinguished *Long Island R.R.* on the ground that the FLSA itself had only in recent years been extended to cover transit employees in the public sector (J.S. App. 7a-8a). Because other federal commerce power legislation, the application of which to transit companies antedated that of the FLSA, expressly exempts public employers from coverage, the district court stated that "[n]o * * * federal authority exists to be eroded in the area of transit" (*id.* at 20a; see also 9a-10a).

Finally, the district court concluded that mass transit cannot satisfactorily be distinguished from fire prevention, police protection and other public services classified as traditional state functions in *National League of Cities* itself (J.S. App. 11a-17a). The court rejected (*id.* at 13a-17a) the view that the critical role played by federal grant funds in stimulating and underwriting the conversion of private transit systems to public ownership differentiates the emerging public role in transit operation from traditional state activities for purposes of delineating the scope of state immunity under the FLSA.

SUMMARY OF ARGUMENT

The decision of the district court effects a novel and unwarranted extension of the doctrine of state immunity from nondiscriminatory federal Commerce Clause legislation. As the courts of appeals have unanimously recognized,[13] the application of the Fair Labor Standards Act

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[13] *Dove* v. *Chattanooga Area Regional Transportation Authority,* 701 F.2d 50 (6th Cir. 1983); *Alewine* v. *City Council,* 699 F.2d 1060 (11th Cir. 1983), petitions for cert. pending, Nos. 82-1974 and 83-257; *Kramer* v. *New Castle Area Transit Authority,* 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983).

to publicly owned transit carriers is constitutionally permissible.

A. In *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act, extending the Act's coverage to virtually all state and municipal employees, are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in the areas of *traditional* governmental functions" (emphasis added). While the Court indicated that services such as education and police and fire protection are traditional governmental functions for this purpose and, conversely, that state operation of a railroad is not an immunized function, it did not purport to provide a complete listing of activities falling within (or without) the protected sphere.

In this case, the district court held that local transit service is a traditional government function exempt from application of the FLSA. But that holding is contrary to *National League of Cities* itself, because the historical record shows that until quite recently mass transit, like railroad operation, was a service that the states generally did not undertake to provide. A substantial share of the transit industry remains, even today, in private hands.

The district court did not deny that mass transit historically has been provided by the private sector, with public participation a recent development (see J.S. App. 5a). The court reasoned, however, that immunity should nevertheless be extended to local transit because it is one component of the states' larger transportation systems and because the states have traditionally assumed responsibility for other transportation-related activities, such as road building. This rationale is inconsistent with *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1981), for the same could have been said of the commuter railroad involved there. Nor, contrary to the district court's alternative rationale, does a history of state *regulation* of private transit carriers establish mass tran-

sit as an *integral* government *operation.* On the contrary, the states' historical choice—regulation subject to preemption by federal legislation such as the FLSA, in preference to public operation—confirms that application of federal wage standards to public transit enterprises does not affect basic state prerogatives in a manner that vitiates the essential sovereignty of the states.

B.1. The manner in which the recent growth of the public sector of the transit industry occurred corroborates this conclusion. The shift toward public operation was substantially assisted and encouraged by the enactment of the Urban Mass Transportation Act of 1964, which made available federal grants covering 80% of the cost of acquiring private transit systems or building new systems. Congress enacted the UMT Act in large measure because it determined (based upon the testimony of state and municipal officials and transit operators) that, absent substantial federal financial assistance, many communities would lose all transit service and others would face severe curtailment of service.

The federal funds provided by the UMT Act enabled many states and localities to acquire privately owned systems. Indeed, appellee APTA has acknowledged that in many cities "federal assistance not only improved transit but saved it from extinction." American Public Transit Association, *Transit Fact Book 1981*, at 30. And the Manager of the San Antonio Transit System, predecessor to appellee SAMTA, told Congress in 1970 that "if we do not receive substantial help from the federal government" San Antonio might "end up with no transportation at all" (see pages 31-32, *infra*). Given this critical federal role in the development of the nationwide public transit industry, it would be peculiar indeed to regard the provision of transit service as the kind of core state function that is beyond the reach of federal commerce power regulation.

2. In *Long Island R.R.*, 455 U.S. at 687, the Court held that the intergovernmental immunity doctrine does not permit the states to erode federal commerce power

authority by "acquiring functions previously performed by the private sector." Yet the district court's decision sanctions just such erosion. At the time that large numbers of local governments began to acquire transit systems, employment relations in the transit industry had long been the subject of federal regulation under the National Labor Relations Act. Congress also had extended the FLSA to transit systems prior to the wave of public takeovers following passage of the UMT Act. By choosing to enter the transit industry, public operators subjected themselves to these enactments.

C.1. Even if mass transit were now to be considered a core governmental function, application of the FLSA to public transit systems would not intrude upon state sovereignty. The impact of the transit provisions of the FLSA does not "portend[] anything like the * * * wide-ranging and profound threat to the structure of State governance" (*EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 13) condemned in *National League of Cities*. Moreover, in accepting federal financial assistance for the purpose of acquiring private transit systems, public transit operators agreed to preserve benefits received by the employees from their private employers—which, in the case of much of the industry, included payment of the federal minimum wage. Finally, because collective bargaining agreements in the transit industry generally required payment of overtime, Congress concluded that phasing out the overtime exemption for public transit operating employees in 1974 would not create an undue burden.

2. The federal interest in application of the FLSA to public transit carriers is a powerful one. In enacting the UMT Act, Congress determined that transit service has an important and direct impact on interstate commerce. Congress determined in addition that public transit systems often are in competition with private carriers and that failure to cover public systems under the FLSA would sanction unfair competition. Congress's "determin[ation] that a uniform regulatory scheme" is

required in this area is entitled to substantial deference. *Long Island R.R.*, 455 U.S. at 688.

3. At the time that FLSA coverage was extended to the public sector of the transit industry in 1966, transit was still predominantly a service provided by the private sector. Thus, given the federal interest in regulating interstate commerce and preventing unfair competition, the constitutionality of these provisions could scarcely have been questioned. But if these provisions were valid when enacted less than two decades ago, they cannot be said to intrude impermissibly upon a core area of local governmental functions today. Any adjustment of the FLSA in light of changed social or economic conditions is a task for Congress, not the courts.

ARGUMENT

APPLICATION OF THE FAIR LABOR STANDARDS ACT TO PUBLIC TRANSIT CARRIERS DOES NOT VIOLATE THE TENTH AMENDMENT

"[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) that dictates "deference to * * * congressional judgments" embodied in the legislation "unless * * * demonstrably arbitrary or irrational" (*Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 84 (1978)). In *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), however, this Court held that the 1974 amendments to the Fair Labor Standards Act that extend minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions" (emphasis added).[14] As indicated

[14] The Court repeatedly characterized as "traditional" the state activities upon which the federal legislation was deemed impermissibly to intrude. See, *e.g.*, 426 U.S. at 849 ("[t]he degree to

above (page 5), the Court did not purport to provide an "exhaustive catalogue" of local government activities that fall within the protected sphere, but did single out operation of a railroad as a non-exempt activity.

In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), the Court recapitulated the holding of *National League of Cities*, stating (*id.* at 287-288 (footnote omitted; emphasis in original)):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

Even where these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29. See also *United Transportation Union* v. *Long Island R.R.*, 455 U.S. at 684 n.9.

Most recently, in *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 8-9, the Court emphasized that "[t]he

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which the FLSA amendments would interfere with traditional aspects of state sovereignty * * *"), 851 ("services * * * which the States have traditionally afforded their citizens"), 851 n.16 ("activities * * * within the area of traditional operations of state and local governments"), 855 ("those governmental services which the States and their political subdivisions have traditionally afforded their citizens"). See also *id.* at 854 n.18 (operation of a railroad is not "in an area that the States *have regarded* as integral parts of their governmental activities" (emphasis added)).

principle of immunity articulated in *National League of Cities*" does not create "a sacred province of state autonomy" but instead is a "functional doctrine" tailored to "ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' [*National League of Cities* v. *Usery*, 426 U.S.] at 845 (quoting *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), not be lost through undue federal interference in certain core state functions." The decision of the district court holding the Fair Labor Standards Act unconstitutional as applied to public transit employment is contrary to the limiting principles recognized in these decisions.

A. Operation Of A Transit System Is Not A Traditional Government Function

1. Contrary to the view of the district court (J.S. App. 6a, 11a-17a), provision of mass transit services is distinguishable in critical respects from the "core state functions" such as public education, safety, health, sanitation, parks and hospitals, held to be immune from the operation of the Fair Labor Standards Act in *National League of Cities*. First, mass transit is not a traditional local government function. As the district court acknowledged (*id.* at 5a (emphasis in original; footnote omitted)): "The historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Similarly, APTA has itself recognized that "[p]ublic ownership of transit is a recent development." American Public Transit Association, *Transit Fact Book* 55 (1978-1979 ed.) (see page 17 note 15, *infra*).

The historical record supports these assessments. Indeed, until the 1960's mass transit had been predominantly performed by the private sector. At the time of World War II, only 20 street railways and bus systems, carrying 7% of the nation's transit riders, were in public ownership. American Public Transit Association,

Transit Fact Book 1981, at 27.[15] Even in 1960, only 64 of the 1251 transit systems extant were publicly owned. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 27 (1963) (testimony of Robert Weaver) (hereinafter cited as *1963 UMT Act Hearings*). Mass transit then was still a private enterprise in many of the nation's largest cities, including Atlanta, Baltimore, Buffalo, Cincinnati, Dallas, Denver, Houston, Milwaukee, Minneapolis, New Orleans, Pittsburgh, St. Louis, San Diego and Washington, D.C. *Id.* at 313 (testimony of George W. Anderson, Executive Vice President, American Transit Association).[16]

To be sure, subsequent to the enactment of the Urban Mass Transportation Act of 1964 (UMT Act), 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made substantial federal funds available to local governments for mass transit construction and operation (see pages 7-8, *supra*, and pages 26-28, *infra*), the trend toward public ownership of transit substantially accelerated. In 1967 over 50% of all transit riders patronized publicly owned systems. *Transit Fact Book 1981*, *supra*, at 27. The latest available information is that slightly over half the operating systems, carrying over 94% of the riders, are now publicly owned. *Ibid.* Even so, as late as 1981, half of the

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[15] The 1978-1979 edition of the same reference cites the figure of 35 systems in public ownership, but does not vary the percentage of riders carried. *Transit Fact Book*, *supra*, at 55. We note with interest that APTA, without material revision in the underlying historical data, has revised its assessment of these facts. As indicated above (page 16), the earlier edition of the *Transit Fact Book* concludes that "[p]ublic ownership of transit is a recent development" (*ibid.*). The 1981 edition reverses that judgment, stating: "Public ownership of transit is not a recent development." *Transit Fact Book 1981*, *supra*, at 27.

[16] We note, as well, that until relatively recently many areas had no mass transit, public or private. As of 1963, 60 cities with a population in excess of 25,000 had no such service. *1963 UMT Act Hearings* 330-331 (testimony of George W. Anderson).

nation's urban mass transit systems (336 out of 686) and 91 of 339 systems in rural areas were still privately owned.[17] Moreover, many of the cities that have acquired transit systems in recent years have contracted out responsibility for operation of these systems to private transit management companies, which are in some cases the very companies that previously owned the systems. Of the 350 publicly owned systems in urbanized areas, more than 120 (including some of the larger systems) are privately managed.[18]

As these statistics indicate, mass transit cannot be deemed "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities* v. *Usery*, 426 U.S. at 855 (footnote omitted)). Accordingly, the application of the FLSA to require fair wage standards in the public transit industry is not precluded by the doctrine of intergovernmental immunity. *Helvering* v. *Powers*, 293 U.S. 214 (1934),

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[17] U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 19 (Aug. 1981) (hereinafter cited as *DOT Urban Transit Directory*); U.S. Dep't of Transportation, *A Directory of Regularly Scheduled Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

[18] *DOT Urban Transit Directory, supra*, at 19; Aff. of Alexander Cohn (May 19, 1980), ¶ 4 and Exh. B thereto.

The widespread use of private transit management companies, many of which are actually the direct employers of the transit system employees, is at least partially attributable to the need to reconcile state law prohibitions upon public employee collective bargaining with the mandate of § 13(c) of the UMT Act, 49 U.S.C. 1609(c), which requires recipients of federal mass transit aid under the Act to make "[s]uch protective arrangements * * * as may be necessary for * * * the continuation of collective bargaining rights." See *Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, 650 F.2d 1379, 1386 (6th Cir. 1981), rev'd on other grounds, 457 U.S. 15 (1982); 43 Fed. Reg. 13558 (1978); *1963 UMT Act Hearings* 264 (statement of Walter J. McCarter, General Manager, Chicago Transit Authority).

is directly in point. There the Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts because the transit operation was not a traditional government function (*id.* at 227):

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.[19]

Nor does the recent trend toward public ownership of local transit services justify extension of state immunity under the FLSA to these services. In *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1982), the Court held that the application of the Railway Labor Act to govern labor relations of a state-owned commuter railroad does not trench impermissibly upon state sovereignty. The Court acknowledged that "some passenger railroads have come under state control in recent years" but emphasized that "that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." 455 U.S. at 686 (emphasis in original). The Court accordingly concluded (*ibid.*):

> Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

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[19] In *National League of Cities*, the Court rejected the contention that " 'the activities in which the states have traditionally engaged,' " which had been held to mark the " 'boundary of the restriction upon the federal taxing power,' " do not supply a like " 'limitation upon the plenary power to regulate commerce.' " 426 U.S. at 854, quoting *United States* v. *California*, 297 U.S. 175, 185 (1936). But nothing in *National League of Cities* suggests that Congress's power to regulate commerce is *more* limited than the power to tax state activities. See 426 U.S. at 843-844 n.14.

That conclusion is equally applicable to local public transit systems. Indeed, the Court observed:

> "[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause . . . ."

United Transportation v. *Long Island R.R.*, 455 U.S. at 685 n.11 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (opinion of Burger, C.J.)).

Significantly, a key justification for singling out public transit workers for FLSA coverage in 1966, at a time when public employees generally were not within the Act's protection (see pages 2-4 & note 5, *supra*), was to eliminate the unfair competitive advantage that public transit systems had enjoyed over private systems since the latter had been covered by the Act in 1961. Both the House and Senate Reports underscored that public transit systems, even if "not operated for profit,"

> are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. *Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."*

H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. 1487, 89th Cong., 2d Sess. 8 (1966) (emphasis added).

2. The district court acknowledged that mass transit service traditionally has been provided by private enterprise rather than local government (see page 9, *supra*). The court reasoned, however, that other transportation activities such as road building historically were carried out by states (J.S. App. 4a) and suggested that "[m]ass transit is an integral component of a state's transportation system" (*id.* at 5a). But the same could equally have been said of the commuter railroad in *Long Island*

R.R. Plainly, *National League of Cities* does not require that all employment pertaining in any way to any mode of transportation be treated as a single service in determining whether the application of the wage requirements of the FLSA to public transit operations impairs a state's sovereignty (see page 23 note 22, *infra*). And the historical role of government in road building (see *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841, 845-846 (1st Cir. 1982)) obviously distinguishes that activity from transit operations.

The district court's alternative rationale for disregarding the lack of a dominant historical tradition of state operation of local transit service was that historic state *regulation* of local transit service suffices to render mass transit "traditionally * * * a state prerogative and responsibility" (J.S. App. 6a). The court declared (*ibid.*):

> That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history.

This reasoning, which fundamentally misconceives the premise of *National League of Cities*, cannot be reconciled with this Court's decisions. Congress's authority to override state regulation by exercise of its commerce power is well established and is not limited by considerations of state sovereignty. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289-292. Thus, preemption of state regulatory authority by enactment of the FLSA amendments of 1961, 1966 and 1974 did not run afoul of the Tenth Amendment. Such federal legislation neither "regulates the 'states as states'" (*Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 287 (quoting *National League of Cities*, 426 U.S. at 854)), nor "affects basic *state* prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence'" (*United Transportation Union* v. *Long Island R.R.*, 455

U.S. 686-687 (quoting *National League of Cities*, 426 U.S. at 851) (emphasis added)). Cf. *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 397-398 (1951).[20]

A history of state regulation of private transit enterprise simply cannot be regarded as the equivalent of state operation of transit services for this purpose and provides no predicate for treating transit services recently taken over by a public entity as a traditional and essential element of state sovereignty. See *Div. 1287, Bus Employees* v. *Missouri*, 374 U.S. 74 (1963);[21] *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Labora-*

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[20] In *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. at 397-398, the Court rejected the claim that the substantial local interest in the affairs of a private bus company, operated as a public utility under state regulation, precluded application of the National Labor Relations Act to a labor dispute between the utility and its employees, explaining "these questions are for legislative determination" (*id.* at 397). Thus, contrary to the district court's suggestion (J.S. App. 6a), the states do not enjoy freedom "to select the most suitable means to accomplish their goals in areas of unique and special concern to them" without regard to federal legislation regulating commerce. A similar argument was presented, without success, in *Long Island R.R.* See 80-1925 Resp. Br. 11, 13-14, 27-28. And *EEOC* v. *Wyoming* expressly rejects the contention that *National League of Cities* artificially delimits any such "sacred province of state autonomy" (slip op. 9).

[21] In *Div. 1287, Bus Employees* v. *Missouri*, the Court held that despite seizure of a privately operated local transit company by the governor of the state, the state court's authority to enjoin a strike was preempted by the National Labor Relations Act. Explaining that the seizure did not render the public employment exception to the coverage of the NLRA applicable, the Court observed (374 U.S. at 81):

> [T]he State's involvement fell far short of creating a state-owned and operated utility * * *. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company * * *.

tories, No. 81-827 (Feb. 23, 1983);[22] cf. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-437 (1980) ("The basic distinction drawn in [*Hughes* v.] *Alexandria Scrap* [*Corp.*, 426 U.S. 794 (1976)] between States as market participants and States as market regulators makes good sense and sound law"); *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), slip op. 3.[23] On the contrary, the states' funda-

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[22] In *Jefferson County Pharmaceutical Ass'n*, the Court observed that "[t]he retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty," and declared that such state proprietary activities are subject to federal antitrust laws enacted under the Commerce Clause (slip op. 3 n.6 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288)). Yet regulation of retail drug sales by private pharmacists (to the extent not preempted by federal law) is assuredly a traditional police power function. See *Whalen* v. *Roe*, 429 U.S. 589, 596-598 (1977). Plainly, the Court did not regard regulation and direct market participation by the state as interchangeable for purposes of Tenth Amendment analysis. The Court indicated, moreover, that the scope of any Tenth Amendment immunity that might attach to state purchases of drugs for use "in traditional governmental functions" must be closely tailored to the scope of those traditional services. *Jefferson County Pharmaceutical Ass'n*, slip op. 3 & n.6.

[23] The cited cases establish that when the states affect "commercial transactions not as 'regulators' but as 'market participants'" (*White* v. *Massachusetts Council of Construction Employees*, slip op. 2), they are freed of the special inhibitions the Commerce Clause places upon state "measures impeding free private trade in the national marketplace" (*Reeves, Inc.* v. *Stake*, 447 U.S. at 437). Our submission in this case is simply that when a state acts in the latter capacity as a participant in the market for transportation services, it necessarily submits itself to the separate restraints that Congress may affirmatively impose upon such market participants pursuant to its plenary power under the Commerce Clause. There is no justification for allowing the states to immunize themselves entirely from the operation of the Commerce Clause by claiming the benefits of acting in the capacity of a market participant without accepting the correlative responsibilities. Indeed, in *Reeves* itself the Court recognized that, notwithstanding the Tenth Amendment and intergovernmental tax immunity doctrines that shield the states, "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private

mental policy decision to pursue their objectives through regulation of nongovernment transit providers rather than direct market participation eloquently testifies that, since the inception of the industry, operation of local transit has "not [been] an area that the States have regarded as *integral* parts of their governmental activities" (*National League of Cities* v. *Usery*, 426 U.S. at 854 n.18 (emphasis added)).

B. Operation Of A Transit System Is Not A Core Government Function That Must Be Exempted From Federal Commerce Power Legislation To Preserve The States' Independence

As we have noted (see page 19, *supra*), the Court held in *Long Island R.R.* that the "historical reality" of private rather than state operation of common carriers establishes that federal commerce power legislation affecting state or local government owned carriers "does not impair a state's ability to function as a state" (455 U.S. at 685, 686). In light of this holding, the historical evidence recounted above (pages 16-18) dictates that the application of the FLSA to public transit employment must be upheld, without more. But even if further analysis is undertaken, the same result follows.

As appellees emphasize (APTA Mot. to Aff. 13; SAMTA Mot. to Aff. 19-20), in *Long Island R.R.* the Court eschewed a blindly historical test for determining whether particular state governmental functions are entitled to immunity from federal commerce power legislation, stating:

> This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regu-

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market participants." 447 U.S. at 439 & n.13. It was from this premise that the Court reasoned that "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from * * * the inherent limits of the Commerce Clause" upon state regulatory action. *Id.* at 439.

> lation. Rather it is meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."

455 U.S. at 686-687, quoting *National League of Cities*, 426 U.S. at 851. But plainly the Court did not intend to discount the significance of the historical record for this purpose, for the Court's observation that "[f]ederal regulation of a state-owned railroad simply does not impair a state's ability to function as a state" was premised directly upon "the *historical* reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments" (455 U.S. at 686 (emphasis added)). Rather, we take the teaching of *Long Island R.R.* to be that primacy is assigned to historical evidence in the Tenth Amendment analysis because such evidence measures objectively whether a federal enactment unduly interferes with state sovereignty. On the other hand, changing circumstances—such as technological development that makes possible the provision of a service that is genuinely new, rather than merely new to government—may at times warrant characterization of a non-traditional activity as an integral attribute of state sovereignty insulated against Acts of Congress that displace fundamental state decisions. We do not quarrel with the latter proposition. It has no bearing upon this case, however, because, as we have explained, when technology made possible the development of mechanized transit service in the United States, that service emerged under the aegis of private enterprise, and transit typically remained within the private sector for more than a half-century, at least into the 1960's.

Under *Long Island R.R.*, then, a municipal activity that fails to pass the historical test for immunized status may still be the subject of a Tenth Amendment claim. But without the aid of any presumption based upon

historical state responsibility for the service, such a challenge to federal commerce power legislation under the Tenth Amendment must overcome the heavy burden of demonstrating directly that state independence is substantially undermined by application of the federal legislation to the non-traditional state activity. Appellees cannot make such a showing because the circumstances under which the recent growth of public ownership of local transit systems occurred confirm that application of the FLSA to public transit systems does not affect a "core state function" in a manner inconsistent with the separate and independent existence of the states.

1. *The Growth Of Public Transit Service Reflects Cooperative Federalism, Not Independent State Initiatives*

a. The recent conversion of transit systems from private to public ownership was by no means a grass roots or local phenomenon. Rather, that shift was spurred by enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made available substantial federal financing for public acquisition of private systems and construction of new systems and facilities. By 1964 Congress had recognized the "deterioration or inadequate provision of urban transportation facilities and services" (49 U.S.C. 1601(a)(2)), and had concluded that "[m]ass transportation needs have outstripped the present resources of the cities and States, and [that] a nationwide program can substantially assist in solving transportation problems." H.R. Rep. 204, 88th Cong., 1st Sess. 4 (1963). As the Court observed in *Jackson Transit Authority* v. *Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982) (emphasis added):

> When the Act was under consideration in the Congress, that body was aware of the increasingly precarious financial condition of a number of private transportation companies across the country, and *it feared that communities might be left without ade-*

quate mass transportation. See S. Rep. No. 82, 88th Cong., 1st Sess. 4-5, 19-20 (1963). The Act was designed in part to provide federal aid for local governments in acquiring failing private transit companies, so that communities could continue to receive the benefits of mass transportation despite the collapse of private operations. See §§ 2(b) and 3, as amended, 49 U.S.C. §§ 1601(b) and 1602.

The UMT Act established a framework "to provide assistance to State and local governments and their instrumentalities in financing [mass transit] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C. 1601(b)(3). Under the provisions of the UMT Act, local government bodies with transit responsibilities are eligible to receive federal grants defraying 80% of their capital outlays, including the costs of acquiring local private systems and making capital improvements and the costs of building new facilities from scratch, as well as up to 50% of their operating expenses. 49 U.S.C. (& Supp. V) 1603(a), 1604(e).[24]

Substantial federal aid has been provided to local public transit systems pursuant to the UMT Act. By 1978 more than $13 billion in aid had been awarded under the UMT Act and other federal programs. *Transit Fact Book* 57 (1978-1979 ed.). In fiscal year 1980 alone, $3.9 billion was provided, including 498 operating assistance grants totalling $1.12 billion. *Transit Fact Book 1981*, *supra*, at 67 (table 19), 68 (table 20). Nationwide, federal revenues covered 17.3% of all operating expenses of public transit systems in 1980, 30.2% of all subsidies for farebox revenues. *Transit Fact Book 1981*, *supra*, at 29, 30. More strikingly, as APTA has acknowledged, "[a]lmost all transit capital revenue is * * * received from

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[24] Authorization for operating expense subsidies was provided by § 103 of the National Mass Transportation Assistance Act of 1974, Pub. L. No. 93-503, 88 Stat. 1568, which revised § 5 of the UMT Act, adding § 5(d)(1) and (e) thereto, 49 U.S.C. 1604(d)(1) and (e).

government agencies." *Id.* at 29. Thus, in 1980 alone, "the federal government contributed 2.8 billion dollars toward the purchase of transit capital equipment" while state and local governments apparently contributed only the statutory matching share required by federal law as a condition of the award of federal assistance. *Ibid.*; see 49 U.S.C. 1604(e). Federal capital grants exceeded $2 billion annually in fiscal 1978 and 1979. *Transit Fact Book 1981, supra*, 67 (table 19).[25] As indicated above (pages 7-8), both SAMTA and its predecessor, the San Antonio Transit System, were beneficiaries of large amounts of federal financial assistance.

The enactment of the UMT Act in 1964 heralded the substantial expansion of the state and local governmental role in providing urban transit described above (pages 17-18). Although it is impossible to state with assurance what would have happened had federal funding not been made available, there is reason to believe that many cities would not have entered the transit business; certainly they had not generally undertaken to perform that service before the advent of federal financing. As the Court noted in *Jackson Transit*, 457 U.S. at 17, it was Congress's conclusion that absent a dramatic infusion of federal funds many communities would simply lose all local transit service. Indeed, the Senate Report highlighted statistics compiled by the American Transit Association reflecting that at least 194 privately operated local transit systems had been abandoned in the nine year period following January 1, 1954, and emphasized the multiple problems caused by abandonment of transit systems and transit rights-of-way. S. Rep. 82, 88th Cong., 1st Sess. 4-5 (1963). The House Report was similarly concerned

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[25] According to APTA, equipment and facilities funded with capital assistance from the federal government during the period 1964-1980 included: 42,692 motor buses, 678 trolley coaches, 3,218 heavy rail cars, 497 light rail cars, 1,720 commuter railroad cars, 96 commuter railroad locomotives, and 16 ferry boats, plus over 250 miles of rail lines (not counting mileage or entire systems as yet in the planning stage). *Transit Fact Book 1981, supra*, at 30.

with "abandonment of individual lines or entire systems in some communities" (H.R. Rep. 204, *supra*, at 4), and predicted that without enactment of the proposed bill "additional essential rights-of-way undoubtedly will be abandoned" (*ibid.*).

The statements of local officials and industry representatives indicate that they shared Congress's apprehension that if federal assistance was not forthcoming widespread curtailment, deterioration and abandonment of mass transit service would result. Governor Peabody of Massachusetts informed Congress:

> [W]e are fully aware of the dire straits and consequent need for improvement of public transportation in the smaller urban portions of the Commonwealth as well as in the Greater Boston area. The private bus industry is clearly in grave financial difficulty and many communities outside of the core Boston area have already lost or are in danger of losing what public transportation facilities they now possess.

1963 UMT Act Hearings 91. Governor Peabody frankly acknowledged the dependency of the states upon federal assistance to carry out an essential program of modernization and expansion of existing facilities (*ibid.*):

> We also know that just as we would have been incapable of carrying out our highway program without the assistance of 90-10 and 50-50 Federal grants, we cannot make the proper capital investment in public transportation facilities without some similar Federal assistance.

The director of the Atlanta Region Metropolitan Planning Commission, which was then planning to construct a new rapid transit system, made clear that such new systems had an equally pressing need for federal assistance:

> [I]t is generally assumed in Atlanta that the achievement of a completely balanced transportation system cannot be attained without a balanced Federal aid program for transportation * * *.

> It is clear that the magnitude of the initial public expenditures necessary for rapid transit will make it very difficult for the local governments. Without Federal aid, rapid transit will be realized only in the distant future.

1963 UMT Act Hearings 398 (statement of Glenn E. Bennett). The American Transit Association presented a compilation reflecting that more than 100 cities had lost all mass transit service because of abandonment of private systems in the period following 1954. *Id.* at 316-329. Other witnesses agreed that absent federal aid many systems would be abandoned, leaving the cities formerly served totally without service, while other systems would progressively decline, offering extremely limited and unattractive service.[28]

Events in the aftermath of the enactment of the UMT Act strongly suggest the substantial difference made by the availability of federal funds for municipal acquisition of existing transit systems or creation of new ones. Whereas on the eve of the adoption of the UMT Act only 5% of all existing transit systems were publicly owned, after a decade and a half of massive federal assistance to states and local governments roughly half of the operating systems in urban areas had passed into public ownership. See pages 17-18, *supra*. As early as September 1976, some 115 cities had employed UMT Act funds to acquire local private bus systems. F. Siskind and E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of the Urban Mass Transit Act of 1964*, at 9-11 (May 1978). Moreover, transit operators

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[28] *1963 UMT Act Hearings* 93 (Joseph F. Maloney, Director, Massachusetts Mass Transportation Commission), 190 (W. Elmer George, Director, Georgia Municipal Association), 193 (Adrien J. Falk, Chairman, San Francisco Bay Area Transit District), 204-206 (W.P. Coliton, President, Chicago South Shore & South Bend R.R.), 248 (Otto Kerner, Governor of Illinois), 295, 297, 299, 302 (Richard L. Lich, Railway Progress Institute), 314, 330 (George W. Anderson, Executive Vice President, American Transit Association), 339-340 (A.L. de Mayo, Treasurer, American Transit Corp.), 377 (James W. Symes, Chairman, Pennsylvania R.R.).

have frankly acknowledged the critical role played by federal grant assistance. For instance, in *Alewine* v. *City Council*, 699 F.2d 1060, 1063 (11th Cir. 1983), petitions for cert. pending, No. 82-1974 (filed June 3, 1983) and No. 83-257 (filed Sept. 9, 1983), the City of Augusta, Georgia, "stipulated that had it not been for the federal grant it would not have purchased the assets of the Augusta Coach Company." And APTA itself has acknowledged that federal funds were

> used by many cities [during the 1960's] to buy the vehicles and facilities owned by private transit systems that were on the verge of bankruptcy. *In those cities federal assistance not only improved transit but saved it from extinction.*

Transit Fact Book 1981, *supra*, at 29-30 (emphasis added). The Court described an example of this pattern in *Jackson Transit*, 457 U.S. at 18:

> In 1966, petitioner city of Jackson, Tenn., applied for federal aid to convert a failing private bus company into a public entity, petitioner Jackson Transit Authority.

The history of public transit in San Antonio is no exception to the general pattern. SAMTA did not enter into operations until long after the enactment of the UMT Act, and has received the benefit of extensive federal capital and operating assistance. Although appellee's predecessor, the San Antonio Transit System, was created before the era of federal funding, when it became unable to cover its costs from the fare box it, too, was the beneficiary of substantial federal assistance. See pages 7-8, *supra*. In 1970 the General Manager of the San Antonio Transit System explained to Congress the likely consequences if federal aid were not made available:

> [I]f we do not receive substantial help from the Federal Government, San Antonio may drop out of th[e] small list of public authorities * * * who are paying their own way out of revenues from the fare

> box and join the growing ranks of cities that have inferior transportation or may end up with no transportation at all.

Urban Mass Transportation: Hearings on H.R. 6663, S. 3154, H.R. 7006 et al. Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 419 (1970) (statement of F. Norman Hill).

The federal role in mass transit was not limited to underwriting the substitution of public agencies for private transit companies, modernization of existing systems and creation of new transit systems. Prior to the enactment of the UMT Act, "[a]s suburban development increased, the tendency was for each community to maintain its political and fiscal individuality and shun comprehensive urban transportation planning." American Public Works Association, *History of Public Works in the U.S. 1776-1976*, at 178 (1976); see also *1963 UMT Act Hearings* 92 (statement of Richard Sullivan); *id.* at 94 (statement of Joseph F. Maloney). The UMT Act, however, was intended to "encourage the planning and establishment of *areawide* urban mass transportation systems." 49 U.S.C. 1601(b)(2) (emphasis added). Congress made funding available for a project only if it was designed as part of a comprehensive areawide plan, meeting federal criteria for improved transportation, and provided that grants could only be made to public agencies that had the legal and financial authority to carry out such projects. See 49 U.S.C. (Supp. V) 1602(a)(2)(A), 1604(b), 1604(g), and 1607; H.R. Rep. 204, *supra*, at 14. By means of these requirements, local governments were induced, in many instances for the first time, to band together and to create metropolitan transit systems spanning the entire urban area.[27] Thus, far from being in-

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[27] SAMTA was created in 1978, to serve Bexar County, Texas, pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982), which authorized creation of metropolitan area-wide transit authorities. Article 1118x was first enacted in 1973.

tegral to the functioning of state and local governments, the very shape of transit systems as they exist today reflects the imprint of *federal* policy.

The transfer of responsibility for providing local transit service thus established not a new integral aspect of state or local government, but a classic venture in "cooperative federalism." See *FERC* v. *Mississippi*, 456 U.S. 742, 764-767 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289. Given the critical role played by the federal government in the development of a nationwide public transit industry, it can hardly be claimed that, although non-traditional, operation of local transit by the states and their subdivisions has become a "core state function" that cannot be subjected to federal legislation establishing fair minimum wage standards without destroying the states' "separate and independent existence." Compare *EEOC* v. *Wyoming*, slip op. 9; *United Transportation Union* v. *Long Island R.R.*, 455 U.S. at 686-687. As the Sixth Circuit has remarked: "It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations." *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

b. The district court concluded that federal funding is irrelevant to the question of intergovernmental immunity (J.S. App. 13a-16a). The court below reasoned that: (1) federal subsidies are an exercise of Congress's Spending Power rather than its Commerce Clause authority, (2) federal monies support many of the functions treated as core aspects of sovereignty in *National League of Cities*, and (3) federal funding, because variable, cannot measure the extent of a state's Tenth Amendment immunity. Appellants have echoed these themes (APTA Mot. to Aff. 23-27; SAMTA Mot. to Aff. 12-14, 24-27). But these observations do not support the decision below.

1. It is immaterial that federal wage legislation respecting mass transit does not itself rest upon Congress's

Spending Power. Federal funding is pertinent in this case not because it supplies the constitutional basis for imposing conditions directly upon the states, but simply because the extensive involvement of the federal government in the growth of public transit is a historical fact that indicates that mass transit—even though it has shifted partly into the public sector—still is not a "core state function" that must be shielded from the federal minimum wage and overtime laws in order to preserve the states' "*separate* and *independent* existence" (*National League of Cities* v. *Usery*, 426 U.S. at 851 (emphasis added)).

2. The role played by federal funding and other requirements of federal law in the public transit industry is significantly different from that of federal grants supporting certain traditional local government functions. To be sure, federal monies are available for education, public safety, and public health activities undertaken by the states. But the federal share of total local expenditures in those areas is generally far less significant than the federal share of expenditures in public transit, particularly in respect to capital costs. For instance, while the federal government typically supplies 80% of all capital construction and facility acquisition costs for public transit, and has supplied a larger share of operating subsidies than state government in many recent years (see *Transit Fact Book 1981*, *supra*, at 29), "[t]he Federal Government has traditionally played a limited role in financing education" (*Budget of the U.S. Government Fiscal Year 1984*, H. Doc. 98-3, 98th Cong., 1st Sess. 5-86 (1983)). Federal funds provide less than 10% of all revenues for public elementary and secondary schools. See, *e.g.*, Bureau of the Census, *Statistical Abstract of the U.S. 1982-83*, at 156 (table 252); Bureau of the Census, *Statistical Abstract of the U.S. 1980*, 161 (table 263). Moreover, while public education had a venerable tradition in the United States by the time of en-

actment of the Fair Labor Standards Act in 1938, federal aid to education constituted only a bit more than 1% of all revenues for public elementary and secondary education in that year. Bureau of the Census, *Historical Statistics of the U.S.*, Pt. 1, 373 (series H 486, 488) (1975) (*Historical Statistics*). In 1918, the earliest date for which federal aid to local education is recorded by the Census Bureau, federal aid was .2% of local school revenues. *Ibid.*[28]

More important, though, than the high level of federal financial assistance to public transit operations is the special role that federal assistance played as a catalyst in the conversion of transit systems from the private to the public sector in many localities. See pages 28-32, *supra*. Neither the district court nor appellees have suggested that federal assistance played even a remotely comparable role respecting any of the other activities recognized as traditional state and local government functions in *National League of Cities*. On the contrary, police and fire protection, public education and public hospitals were provided by municipalities long before federal aid became available. We may therefore conclude that such services indeed are "functions such as th[o]se which [state and local] governments are created to provide" (*National League of Cities*, 426 U.S. at 851). By contrast, history shows that transit is not within the unique competence or responsibility of local governments,

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[28] Similarly, while $716 million was earmarked for federal law enforcement assistance to local governments in the 1977 budget, *National League of Cities*, 426 U.S. at 878 (Brennan, J., dissenting), state and local government criminal justice system expenditures in that year totalled $18.8 billion. *Statistical Abstract of the U.S. 1980*, *supra*, at 192 (table 324). In 1938, federal expenditures for policing activities (the bulk—if not all—of which was presumably direct federal expenditures rather than aid to states) totalled $19 million, whereas state and local government expenditures were $359 million; in 1902 federal policing expenditures were negligible whereas local governments spent $50 million on law enforcement. *Historical Statistics*, *supra*, at 416 (series H 1013, 1017, 1021, 1025).

but is a service that many states were either unwilling or unable to provide absent substantial federal funds. The UMT Act itself is based upon Congress's determination, following extensive hearings, that mass transportation had become a national, rather than a purely local, problem that had "outstripped the present resources of the cities and States," H.R. Rep. 204, *supra*, at 4; see also *1963 UMT Act Hearings* 17 (statement of Robert C. Weaver), and that federal aid was "essential" (49 U.S.C. 1601(a)(3)) if the problem was to be solved. This congressional determination, to which deference is due, distinguishes the public transit industry from the core local government functions whose status was addressed in *National League of Cities*.[29]

SAMTA suggests (Mot. to Aff. 24-26) that transit systems are indistinguishable from public hospitals, which the Court in *National League of Cities* held to be exempt from the application of the FLSA, see 426 U.S. at 855, because the hospital industry remains predominantly in the private sector, and because hospital construction has received substantial federal assistance. The largest sector of the hospital industry undoubtedly is in private hands. But the pertinent point is that pub-

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[29] There are, of course, other examples of municipal activities heavily funded by the federal government, for instance construction of sewage treatment plants (see APTA Mot. to Aff. 24 n.35). But federal funding did not support transformation of sewage treatment from a private sector responsibility to a local public responsibility, as it did transit. Moreover, because sewage treatment has never been a private sector responsibility, there is no problem of unfair competition between government and private enterprise such as impelled Congress to extend FLSA coverage to public transit employees (see page 20, *supra*). Additionally, Congress has never determined that special attributes of sewage treatment service warrant extension of FLSA coverage to public employees in that field, separate and apart from public employees generally, as it has done in the case of public transit. There is no need in this case to consider whether application of the FLSA to other state enterprises receiving federal financial assistance would offend the doctrine of intergovernmental immunity.

lic hospitals constitute a vigorous independent national tradition of long standing in the United States.[30] This Court has determined that public "schools and hospitals provide[] an integral portion of those government services which the states and their political subdivisions have *traditionally* afforded their citizens." *National League of Cities*, 426 U.S. at 855 (emphasis added); see also *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories*, slip op. 3-4 & nn. 6 & 7. There is no evidence that the public hospital sector was created by state and local government acquisitions of formerly private enterprises, much less that such transfers were underwritten with federal funds. On the contrary, as SAMTA acknowledges (Mot. to Aff. 25), the trend, if anything, is in the opposite direction. Moreover, to the extent that hospital services were provided by nongovernment entities in the past (and present), the major providers were churches and other nonprofit organizations, rather than private profit making enterprises. See note 30, *supra*. Thus, there is simply no factual basis for the analogy SAMTA would draw between public transit operations and public hospitals.

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[30] For instance, in 1923, there were 601 state hospitals with 302,208 beds, and 915 locally owned hospitals with 115,871 beds (along with 220 federal hospitals with 53,869 beds) in operation, compared with 1,762 (much smaller) proprietary hospitals with only 45,719 beds. Far more significant than the proprietary sector in terms of services provided was the nonprofit sector, with 77,941 beds in 893 church operated hospitals, and 160,114 beds in 2,439 other nonprofit hospitals. *Historical Statistics*, *supra*, at 79 (series B 345-358). In 1980, there were a total of 5,904 short-term care nonfederal hospitals in operation. 1,835 were operated by state and local government; only 730 were operated on a for-profit basis. The balance, 3,339 hospitals, were operated by nongovernmental nonprofit organizations. The foregoing state and local hospitals had 212,000 beds and 602,000 employees, while the proprietary sector had only 87,000 beds and 189,000 employees. The nonprofit hospitals had the lion's share, 693,000 beds and over 2 million employees. *Statistical Abstract of the U.S. 1982-83*, *supra*, at 112 (table 173).

3. The district court also suggested (J.S. App. 16a) that the potential for reevaluation of federal priorities leading to reduction of federal assistance to public transit makes it inappropriate to consider the role of federal financial assistance. But this suggestion again mistakes the significance of federal funding for purposes of the pertinent constitutional analysis. As we have explained (page 34), we do not seek to defend the application of the FLSA on the basis of the Spending Power. Even if federal aid were reduced or eliminated, the critical role played by federal assistance, particularly capital grants, in making it possible for large numbers of municipalities to enter the transit field could not be gainsaid. Furthermore, the district court's observation that federal aid could be terminated is one-sided. State and local spending decisions are, like federal funding, "responsive to changing political demands" (J.S. App. 16a). Similar considerations of political responsibility and intergovernmental comity influence the policies of both partners.

In any event, there is no reason to believe that federal assistance to mass transit is about to be terminated. Over $3.5 billion in federal funds was actually expended in this area in 1982, and budgetary authority of $4 billion was proposed for fiscal year 1984. See *Budget of the U.S. Government Fiscal Year 1984*, *supra*, at 5-66, 5-68 to 5-69. Moreover, the enactment of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, provides a new secure funding source for mass transit by dedicating one cent per gallon of the recent gasoline tax increase to mass transit capital projects and creating a grant program, funded from general revenues, for capital and operating assistance.[31]

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[31] See Pub. L. No. 97-424, §§ 301-304, 511, 531, 96 Stat. 2140-2150, 2169, 2187-2192; H.R. Conf. Rep. 97-987, 97th Cong., 2d Sess. 149-157, 161-163, 191-193 (1982); H.R. Rep. 97-555, 97th Cong., 2d Sess. 2, 4, 35-42 (1982); *Budget of the U.S. Government Fiscal Year 1984*, *supra*, at 5-68 to 5-69; *id.* at App. I-Q23 to I-Q27.

2. *Extension Of Intergovernmental Immunity To Public Transit Systems Would Erode Federal Authority To Regulate Commerce*

a. The comparatively recent development of substantial public ownership in the mass transit industry serves to distinguish public transit from the governmental activities held exempt from application of the FLSA in *National League of Cities* in an additional respect. The states and their subdivisions entered the fields of police and fire protection, public health and sanitation services, hospitals and education long before the enactment of federal legislation governing terms of employment. And for more than 30 years after the FLSA was adopted Congress recognized the prerogatives of the states in these spheres. The vice of the 1974 amendments to the FLSA thus was the abrupt federal intrusion affecting the entire range of settled patterns of local and state government administration. See 426 U.S. at 845-852; *EEOC* v. *Wyoming*, slip op. 12-13.

In contrast, employment relationships in the private transit industry had long been the subject of federal regulatory legislation under the Commerce Clause when, in the 1960's, local governments began in large numbers to acquire transit systems. The nation's basic labor-management relations statute, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, enacted in 1935, applies to the private transit industry just as it does to other industries affecting commerce. See *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board, supra*; *Div. 1287, Bus Employees* v. *Missouri, supra.* Furthermore, as Congress expanded the scope of national labor legislation, it applied a broad range of federal laws to the private transit industry, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. (& Supp. V) 401 *et seq.* (reporting requirements); the Fair Labor Standards Amendments of 1961 (minimum wage and child labor standards; see page 3, note 5, *supra*); the Equal Pay Act of 1963, 29 U.S.C. 206(d)

(equal pay for women for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* (prohibition against employment discrimination on the basis of race, sex, creed, or national origin); and the Fair Labor Standards Amendments of 1966 (minimum wage; overtime pay for non-operating employees; see page 3 & note 5, *supra*). These statutes reached the majority of all transit systems, 90% of which were still privately owned in 1967. *Transit Fact Book*, *supra*, at 38. Thus, when they assumed ownership of private transit companies, states and local governments entered an industry in which employment relations were subject to established federal legislation.

Because of this significant federal regulatory presence, a municipality deciding to operate a mass transit system "subjects itself to that regulation." *Parden* v. *Terminal Ry.*, 377 U.S. 184, 196 (1964); *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.); *Helvering* v. *Powers*, 293 U.S. at 225 (see pages 18-19, *supra*); see also *Massachusetts* v. *United States*, 435 U.S. 444, 457-458 (1978) (opinion of Brennan, J.). This principle was recently reaffirmed in *Long Island R.R.* Citing the history of federal regulation of the private rail industry, the Court declared (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

In *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d at 310, the court of appeals accordingly concluded:

> [S]ince it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area.

Accord: *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

The district court determined, however, that exemption of public transit employment from the requirements of the FLSA would not entail the kind of erosion of federal authority condemned in *Long Island R.R.* (J.S. App. 6a-11a). The court noted that the FLSA was not applied to private transit until 1961 or to public transit until 1966 and did not extend full protection to transit employees until 1974. But while Congress did not fully exercise its powers to legislate respecting terms of employment in the transit industry until relatively recently, there can be no doubt that the constitutional authority to do so has long been available. If the states' acquisition of private transit operations were held to extend their intergovernmental immunity thereto, it necessarily would vitiate federal constitutional prerogatives. Moreover, the fact is that the FLSA *was* made applicable to the private transit industry in 1961, and, indeed, to public transit in 1966—*before* the bulk of the recent conversions to public ownership took place (see pages 16-18, *supra*).[32]

The Court in *Long Island R.R.* did observe that railroads had long been subject to federal regulatory legislation. 455 U.S. at 687-688. There was no suggestion, however, that such longstanding regulation was necessary to the holding that the State of New York could not extend its immunity to a commuter railroad merely by acquiring the railroad. Although the specific federal legislation at issue here is of comparatively recent vin-

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[32] The fact that the overtime provisions of the FLSA were not fully applied to the transit industry until 1974 does not alter the analysis. Congress had plainly entered the field of wage regulation in the transit industry with the 1961 and 1966 FLSA amendments. The overtime pay requirement is not regulation fundamentally different from that previously in place. No constitutional immunity may be founded upon Congress's decision to regulate one aspect of wages in a given industry but not another. Cf. *EEOC* v. *Wyoming*, slip op. 15 n.17.

tage, it scarcely follows that the freedom from such regulation of state activities of contemporaneous or still more recent vintage is essential to the separate and independent existence of the states. Cf. *Donovan* v. *Dewey*, 452 U.S. 594, 605-606 (1981). Because of the Supremacy Clause, the interests of the states and those of the federal government do not stand on a par in this area. Rather, within the broad limits of Congress's power to regulate commerce, federal legislation applies to the states to the extent deemed appropriate by Congress unless it is determined that such application "so impairs the ability of the state to carry out its constitutionally preserved sovereign function as to come into conflict with the Tenth Amendment." *Long Island R.R.*, 455 U.S. at 683. Unless state functions are already well-established at the time they become subject to nondiscriminatory federal commerce power legislation, it is difficult to discern significant "displace[ment of] the States' freedom to structure integral operations" (*National League of Cities*, 426 U.S. at 852).

In any event, if it were necessary to show that federal regulation of employment in the transit industry was established before the recent trend toward public operation of transit, the half-century of application of the National Labor Relations Act to the transit industry supplies the necessary predicate. Indeed, in *Long Island R.R.* the Court's recitation of the long history of federal railroad legislation was concerned primarily with regulatory schemes other than the Railway Labor Act, the statute directly in issue there. See 455 U.S. at 687-688 & n.13. Thus, like the railroad industry, local transit has long been the subject of substantial federal regulation governing employment relations.[33] To hold that the FLSA, which

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[33] The district court suggested (J.S. App. 9a, 10a) that statutes such as the NLRA are irrelevant here because Congress itself exempted local government employers from their reach. But the issue is not, as the district court thought (*id.* at 9a), whether "any diminution of federal authority under the NLRA that results from a private to public conversion is * * * consistent with congressional

expressly covers public transit employment, impermissibly interferes with state sovereignty is to sanction "ero[sion] of federal authority in [an] area[] traditionally subject to federal statutory regulation" (*Long Island R.R.*, 455 U.S. at 687).

C. Application Of The FLSA To Public Transit Systems Does Not Effect An Unwarranted Intrusion Upon State Sovereignty

1. Even if it were established that mass transit has assumed the status of a core local government function, appellees must demonstrate that application of the FLSA to public transit systems is a "federal intrusion[] that might threaten [the states'] 'separate and independent existence'" (*EEOC* v. *Wyoming*, slip op. 11 (quoting *National League of Cities*, 426 U.S. at 851)) by "directly displac[ing their] freedom to structure integral operations in [these] areas" (*National League of Cities*, 426 U.S. at 852). In view of the course of development of the public sector of the transit industry, and conditions prevailing in the private sector prior to the acceleration of public takeovers in the 1960's, appellees cannot make such a showing.[34]

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intent." Rather, the NLRA is instructive because it evidences that the transit industry has "traditionally [been] subject to federal statutory regulation" (*Long Island R.R.*, 455 U.S. at 687). In examining the succession of federal statutes that historically governed commerce by rail, the Court did not pause in *Long Island R.R.* to inquire whether particular statutes were applicable to publicly operated railroads. The relevance of these statutes was not that they established longstanding regulation of publicly owned railroads; it was sufficient that they established regulation of the heavily private railroad industry. Against this background of federal regulation of the railroad industry, the Court concluded that the Railway Labor Act, which expressly covers state owned commuter railroads (see 455 U.S. at 682 n.4), does not intrude impermissibly upon matters of state sovereignty. A similar analysis is applicable here.

[34] Contrary to appellees' contentions (SAMTA Mot. to Aff. 8-9 & n.8; APTA Mot. to Aff. 6-9), *National Leagues of Cities* does not

First, unlike the FLSA amendments of 1974 condemned in *National League of Cities*, the public transit provisions are carefully targeted at a discrete function, which in most cases was assumed by state and local governments after the initial application of the FLSA to transit operations and even after the application of the FLSA to public transit operations. Compare page 39, *supra*. Thus, in many instances local governments acquired transit systems knowing that they were subject to the Act. Compare *Long Island R.R.*, 455 U.S. at 689-690. And in entering the transit field, local governments could not reasonably have relied upon exemption from the FLSA of publicly owned common carriers operating in commerce. Furthermore, because the public transit provisions of the FLSA are limited in their coverage, their application does not create cause for the concern, underlying *National League of Cities*, "with the effect of the federal regulatory scheme [not only] on the particular decisions it was purporting to regulate, but also with the potential impact of that scheme on the States' ability to structure operations and set priorities over a wide range of decisions" (*EEOC* v. *Wyoming*, slip op. 12). Requiring public operators of transit systems to comply with minimum standards of decency in regard to wages, hours, and child labor is unlikely to set off "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," such as the Court foresaw in *National League of Cities* (*EEOC* v. *Wyoming*, slip op. 13). Rather here, as in *EEOC* v. *Wyoming* (*ibid.*), "[n]othing * * * portends anything

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resolve this "intrusiveness" issue for the public transit industry. The Court made this clear in *EEOC* v. *Wyoming*, slip op. 11 n.11):

> [W]e are not to be understood to suggest that every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an "undoubted attribute of state sovereignty."

like the same wide-ranging and profound threat to the structure of State governance." [35]

The impact of the public transit provisions of the FLSA is further diminished by Section 13(c) of the UMT Act, 49 U.S.C. 1609(c), which provides that "it shall be a condition of any assistance" under the UMT that "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests" of affected employees. Such protective arrangements are required to preserve existing rights for employees of transit systems acquired by public entities. See *Jackson Transit*, 457 U.S. at 17-18. Because of Section 13(c), public transit operators that have accepted federal assistance do not enjoy untrammeled "freedom to structure integral operations" respecting the terms of transit employment. Instead, they are bound to maintain existing wage levels, which, for much of the private transit sector, had been subject to minimum wage standards since 1961. See page 3 note 5, *supra*.

Nor did phasing out of the special overtime exemption for transit operating employees in 1974 intrude upon state prerogatives in an impermissible fashion. To begin with, public transit systems have been required to pay overtime to nonoperating employees since 1966. Second, the overtime exemption was phased out, rather than abruptly abolished. Moreover, collective bargaining agreements in the transit industry at the time of the 1974 amendments almost uniformly required payment of overtime pay after 40 hours in a work week. Aff. of Alexander Cohn (May 19, 1980) ¶ 5; H.R. Rep. 93-913, 93d Cong., 2d Sess. 30-31 (1974). Application of the FLSA overtime standards to public transit systems accordingly does not compel the states generally "to abandon the[ir] public policy decisions" or to cease "do[ing] *precisely what they are doing*" (*EEOC* v. *Wyoming*, slip op. 12 (emphasis in original)).

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[35] The fact that transit service operates on a fee for service basis even in the public sector reduces to some degree the impact of "spillover" effects of transit costs on other public priorities. See page 48 note 37, *infra*.

Congress was aware of the claims of transit operators that paying overtime created special hardships for them in light of special attributes of transit service. H.R. Rep. 93-313, *supra*, at 30. But Congress determined that these problems could be accommodated within the framework of the Act by administrative and judicial construction, and by legislative fine-tuning if necessary (*id.* at 31). In addition, Congress determined, based on review of collective bargaining agreements in the industry, that "the 'problems' of the 40-hour workweek pointed to by some segments of the industry have and already are being met and resolved by a substantial majority of the industry." *Ibid.* Congress's determination that payment of overtime to operating employees would not significantly burden transit operations is entitled to deference.

2. Even when a federal commerce power enactment appears to interfere with protected state functions, a Tenth Amendment challenge may fail because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288 n.29; see also *Long Island R.R.*, 455 U.S. at 684 n.9; *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring). This is such a situation. Denial of congressional authority to establish wage standards for mass transit systems would significantly "impair a prime purpose of the Federal Government's establishment" (*National League of Cities*, 426 U.S. at 855 n.18, quoting *Case* v. *Bowles*, 327 U.S. 92, 102 (1946)), because transit service is intimately related to the flow of interstate commerce, and because Congress has determined that coverage of public transit employees is necessary to avoid unfair competition.

In enacting the UMT Act, Congress recognized the national character of transit problems, emphasizing the interstate impact of transit operations in many locations:

> [T]he problem of providing adequate urban mass transportation service has long ago spilled over the

> boundaries of many local political jurisdictions. In fact, it has spilled over a good many State boundaries. Some 53 of our approximately 200 metropolitan areas either border on or cross State lines.

H.R. Rep. 204, *supra*, at 5. In the UMT Act itself Congress has determined (49 U.S.C. 1601(a)(1)) that

> the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States.

The courts also have long recognized the special significance of transit operations—even local ones—for the flow of interstate commerce. See, *e.g.*, *United States* v. *Capital Transit Co.*, 338 U.S. 286, 290 (1949); *Marshall* v. *Victoria Transportation Co*, 603 F.2d 1122 (5th Cir. 1979); *NLRB* v. *Baltimore Transit Co.*, 140 F.2d 51, 53-54 (4th Cir. 1944); see also *Local Transit Lines*, 91 NLRB 623, 624 (1950); cf. *Bus Employees, Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. at 392 n.14. Because of the direct impact of transit service on interstate commerce the FLSA may constitutionally be applied to public transit employees.

This is especially so because in extending the Act's coverage, Congress expressly determined (H.R. Rep. 1366, *supra*, at 16-17; S. Rep. 1487, *supra*, at 8; see page 20, *supra*) that failure to include public transit systems would unfairly advantage such systems at the expense of private companies with which they were in competition, frustrating one of the basic purposes of the Act. Congress's "determin[ation] that a uniform regulatory scheme" covering public and private transit carriers is necessary to prevent unfair competition certainly was within its authority. *Long Island R.R.*, 455 U.S. at 688. If the Court were to extend intergovernmental immunity to public transit, it would thus effectively deprive the United States of its ability evenhandedly to regulate a significant aspect of interstate commerce. The immunity

doctrine recognized in *National League of Cities* plainly is not intended to afford government operated enterprises preferential status in regard to nondiscriminatory Commerce Clause regulation. See page 23, note 23, *supra*.

Nor has Congress's concern with unfair competition between private and public enterprise become outmoded by the growth of the public sector of the transit industry. The private sector of the industry remains substantial. See pages 17-18, *supra*. Moreover, the pattern of public acquisitions of private systems makes it particularly important not to provide government transit operators an unfair advantage over the remaining private sector operators. Even where public transit is a firmly established norm, the possibility remains for innovative entrepreneurs to devise new services that will successfully compete for patronage.[36] Extension of the intergovernmental immunity doctrine to public transit services necessarily handicaps those who would provide competing services, to the detriment of the public and the free flow of commerce.[37]

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[36] For instance, in the New York City area a number of privately owned express bus operations emerged in the late 1960's and 1970's. N.Y. Times, June 11, 1970, at 90, col. 1. As of 1981 there were 11 privately owned bus transit lines operating within New York City alone. *DOT Urban Transit Directory* 2 (see page 18, note 17, *supra*).

[37] In considering the federal interest in preventing such unfair competition, it is important to remember that, unlike the core governmental services held exempt from the FLSA in *National League of Cities*, which are generally provided to members of the public without user charges, public transit operates on a fee-for-service basis, in competition with other modes of transportation. See *Jefferson County Pharmaceutical Ass'n*, slip op. 4 n.7.

We recognize that, unlike police and fire protection, education, sanitation, public health, and parks, public hospitals undoubtedly receive fees from many of their patients. But even so, public hospitals as well as private nonprofit hospitals have a substantial tradition of providing service free of charge to persons unable to pay. See J. Duffy *A History of Public Health in New York 1866-1966* 178-185 (1974) (80% of patients in hospitals on Manhattan Island

3. Appellees' argument that public transit service is a core governmental function necessarily rests heavily upon the recent expansion of the public sector of the local transit industry (see APTA Mot. to Aff. 11-13; SAMTA Mot. to Aff. 19-23 & n.21). But the district court and appellees ignore the fact that the FLSA was applied to the public sector of the transit industry in 1966, at a time when transit service was, by any measure, still predominantly a service provided by private enterprise. See page 17, *supra*. Thus, any contemporaneous challenge to the constitutionality of the public transit provisions of the 1966 FLSA amendments surely would have been rejected as frivolous. See, *e.g.*, *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 422 (opinion of Burger, C.J.); cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974); *Helvering* v. *Powers*, *supra*. Indeed, appellees do not suggest otherwise.[38]

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were charity cases). Cf. Hill-Burton Act, 42 U.S.C. 291c(e). Transit service is unlike these core functions in that, with rare exceptions, all patrons are required to pay fares that defray a substantial share of operating costs. It is true that, in recent years, transit systems have been unable to meet operating expenses without subsidies from tax revenues. Even so, passenger revenues cannot be regarded as insignificant. In 1980 fares collected amounted to $2.46 billion, and constituted 40.7% of transit industry operating revenues. *Transit Fact Book 1981*, *supra*, at 45, 46 (table 5). Thus, unlike the services held exempt from the FLSA in *National League of Cities*, public transit service is virtually never made "available at little or no direct expense" (*Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979)).

[38] We note that in testifying before Congress against bills to extend FLSA coverage to state and municipal employees in 1971, a representative of the National League of Cities conceded that "transit would be an activity of local government with comparable activity in private enterprise, and therefore * * * could probably be regulated [even though a] municipality was performing the activity." *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., Pt. 5, 1701 (1971) (statement of Richard E. Thompson).

Of course, no such contemporaneous challenge was made; nor was the public transit coverage of the FLSA attacked in *National League of Cities* itself. Nevertheless, appellees' contention is that intervening developments in the transit industry have now rendered these very provisions beyond Congress's authority under the Commerce Clause. Even if federal aid had not played a substantial role in the growth of the public sector of the transit industry, and even if concern for competition between private and public transportation alternatives were not still a sufficient justification for federal legislation, it would indeed be a peculiar and unworkable rule of constitutional law that would countenance this result. On what date did the public transit provisions of the FLSA, assuredly valid when enacted, become unconstitutional? If this doctrine of creeping unconstitutionality were accepted, Congress and the courts would effectively be enjoined to survey subsisting legislation "adjusting burdens and benefits of economic life" (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 15) at regular intervals in order to ensure that changed economic or social conditions had not altered the basis for exercise of federal commerce power authority.

In our constitutional scheme, it is uniquely Congress's role periodically to revisit legislative determinations such as those underlying the public transit provisions of the FLSA, and to adjust them, as the public interest may require, in light of changing conditions, including the expanded role of government (state, local or federal) in the provision of particular services. But precisely because that is so, because Congress is far better equipped than the courts to weigh the pertinent social and economic considerations, and because the interests of the states and municipalities and their citizens are well represented in Congress, extension of a rigid rule of constitutional law to provide an exemption from the FLSA that public transit operators deem desirable is inappropriate. Rather, Congress is the forum to which such petitions should be addressed.

Significantly, on the very day that *Long Island R.R.* was decided, a unanimous Court applied the principles outlined above to limit the constitutional intergovernmental tax immunity of agents of the federal government:

> If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for that decision * * *. And this allocation of responsibility is wholly appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. *Massachusetts* v. *United States*, 435 U.S. 444, 456 (1978) (plurality opinion). * * * But absent congressional action, we have emphasized that the States' power to tax can be denied only under "the clearest constitutional mandate."

United States v. *New Mexico*, 455 U.S. 720, 737-738 (1982) (citations omitted). Similarly, in rejecting another claim of intergovernmental tax immunity advanced by the United States, the Court observed:

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones Congress is best qualified to resolve.

United States v. *City of Detroit*, 355 U.S. 466, 474 (1958). These considerations are equally relevant in assessing wide-ranging state claims to intergovernmental immunity from federal commerce power legislation.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. V) 203:

> As used in this chapter—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a

public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

(1) * * * is an enterprise * * * whose gross annual volume of sales made or business done is not less than $250,000 * * *

* * * * *

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

* * * * *

29 U.S.C. (Supp. V) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, provides in pertinent part:

49 U.S.C. 1601:

> (a) The Congress finds—
>
> (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
>
> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and
>
> (3) that Federal financial assistance for the development of efficient and coordinated

mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. (Supp. V) 1603(a):

* * * The Federal grant for any such project to be assisted under section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. * * *

49 U.S.C. 1604(d)(1)

The Secretary may approve as a project under this section, on such terms and conditions as he may prescribe, (A) the acquisition, construction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service, and (B) the payment of operating expenses to improve or to continue such service by operation, lease, contract, or otherwise.

49 U.S.C. 1604(e):

The Federal grant for any construction project under this section shall not exceed 80 per

centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. 1609(c):

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

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Nos. 82-1951 and 82-1913

IN THE

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OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF APPELLEES

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On Appeals From The United States District Court For The Western District Of Texas

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers [NIMLO], pursuant to rule 36.4, moves the Court for leave to file the attached brief as *amicus curiae* in support of the appellees, San Antonio Metropolitan Transit Authority, *et al.* This motion and brief is filed on behalf of NIMLO and the local governments whose chief legal officers have signed the brief.

NIMLO submits that its brief can assist the Court in evaluating the importance of mass transit operations to local governments. In addition, the brief can assist the Court in determining the suitability of publicly owned mass transit systems for Tenth Amendment protection from federal encroachment. NIMLO's interest in this case is set out in the Interest of the Amicus Curiae section of the attached brief. That brief sets out facts demonstrating the essential nature of mass transit operations to local governments and shows the historic relationship between state and local governments and mass transit systems.

Because of the increasing role of public ownership of transit operations, this case is of nationwide importance, and, we submit, the attached *amicus curiae* brief will assist the Court in evaluating the nationwide importance and impact of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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December 1983

Appellee San Antonio Metropolitan Transit Authority, has withheld consent.

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On Appeals From The United States District Court For The Western District Of Texas

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1,600 local governments, or political subdivisions of states, which are members of the National Institute of Municipal Law Officers [NIMLO]. The member local governments operate NIMLO through their chief legal officers, variously called city attorney, county attorney, corporation counsel, city solicitor, director of law, and other

titles. Each member local government has one vote on all actions taken by the NIMLO organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local governments and the chief legal officers of the members of NIMLO in their official capacity. San Antonio, Texas is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization that provides information and research to its member local governments on current legal problems of local concern, including mass transit labor issues and issues involving federal-local relations.

The local government attorneys who participate in NIMLO's work are responsible for negotiating and drafting labor contracts with municipal employee unions, including mass transit employee unions. The attorneys are also intimately involved in the budgetary processes of local governments, and are responsible for advising local governments on the applicability of federal statutes and regulations to municipal mass transit activities.

NIMLO is greatly concerned that a reversal of the opinion below will result in a combination of an increase in transit rates for the tens of millions of transit riders in this Nation and a reduction in the quality and quantity of the mass transit services provided. Those least able to pay the increased fares, the poor and the elderly, will be harmed the most. NIMLO is equally concerned that an adverse ruling will deprive state and local governments of the right to regulate, free from federal intrusion, the wages and hours of their employees providing other traditional and essential governmental services. The Tenth Amendment guarantees them this right. *National League of Cities v. Usery,* 426 U.S. 833 (1976).

NIMLO, therefore, respectfully urges this Court to affirm the opinion below that mass transit is a traditional governmental function entitled to Tenth Amendment immunity. This will protect the transit riding public from harm and preserve the independent integrity of state and local governments that is essential to the operation of our federalist system.

STATEMENT OF THE CASE

The Statement of the Case set forth in Appellee American Public Transit Association's Motion to Affirm is adopted by the National Institute of Municipal Law Officers for purposes of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

Publicly owned mass transit systems today are the predominant providers of mass transit services. Mass transit has become an integral component of state and local government land use planning, and it serves crucial environmental, social, and economic goals.

Historically, mass transit has been a concern of state and local governments, with minimal federal intrusion. State and local governments have long been involved with mass transit systems as franchisors and regulators, but severe economic problems, coupled with the desire to increase the scope of services provided by mass transit, have recently compelled governmental takeovers of regulated private transit operations.

Mass transit today is a traditional and integral function of state and local government. The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) [FLSA],

impermissibly imposes federal minimum wage and maximum hour regulations on local mass transit operations. The imposition of the FLSA on local public transit operations places a severe financial burden on local transit systems and directly imposes hardships on all classes of transit riders, but especially the poor and the elderly.

In *National League of Cities v. Usery,* 426 U.S. 833 (1976), this Court held that the minimum wage and maximum hours provisions of the FLSA could not constitutionally be applied to the integral and traditional operations of state and local governments. When Congress attempts to displace directly the state and local governments' freedom to structure integral operations in areas of traditional governmental functions, it exceeds its grant of authority under the Commerce Clause.[1]

The basic holding of *National League of Cities* has been reaffirmed by this Court on numerous occasions, most recently last Term in *EEOC v. Wyoming,* 103 S.Ct. 1054 (1983). See also *Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742 (1982); *United Transportation Union v. Long Island Railroad Company,* 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981).

An examination into the current role of state and local governments in mass transit operations compels the conclusion that the operation of publicly owned mass transit systems is today a traditional governmental function. A study of the historical role played by state and local governments in transit operations buttresses this conclusion. Therefore, Congress' attempt to impose FLSA rules and regulations on publicly owned mass transit systems exceeds its authority under the Commerce Clause.

---

[1]U.S. CONST. art. I, § 8, cl. 3.

ARGUMENT

I. THE OPERATION OF PUBLICLY OWNED MASS TRANSIT SYSTEMS IS AN INTEGRAL AND TRADITIONAL FUNCTION OF STATE AND LOCAL GOVERNMENT

A. Mass Transit Today Is A Service Provided Almost Exclusively By State And Local Governments.

The term "traditional" has a variety of meanings, depending in part on the context of the particular issue. While the term "traditional" does imply an historic component, within the context of Tenth Amendment analysis "traditional" is not inexorably entwined with history. In fact, a strictly historic view of traditional functions has been explicitly rejected by this Court. *Long Island Railroad,* 455 U.S. at 686-87.[2]

Traditional, therefore, implies more than historical. A traditional function is a practice that is customary, common, pervasive, or routine. Under this kind of analysis, it is clear that in the area of mass transit operations, public ownership is a traditional governmental function. More than 250 of the 279 urbanized areas with populations over 50,000 people are served in whole or in part by publicly owned mass transit systems. Each of the 50 largest metropolitan areas is served by a publicly owned mass transit system.[3]

---

[2]"This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." *Long Island Railroad,* 455 U.S. at 686-87.

[3]United States Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population,* at 1-12 (Aug. 1981).

An analysis of ridership statistics further demonstrates the predominance of state and local governments in mass transit operations. Ninety-four percent of all transit riders are carried on publicly owned mass transit systems. Ninety percent of all transit vehicles are owned and operated by public transit systems and these vehicles travel 93 percent of all the miles travelled by mass transit vehicles.[4]

B. Publicly Owned Mass Transit Systems Serve Important Local Goals.

Mass transit has become an important means of achieving governmental social, economic and environmental goals, such as serving special segments of society unable to afford other means of transportation, pollution control, energy conservation, and economic development and planning. These benefits accrue not just to transit riders, but to the public as a whole. The increased costs attendant upon application of the FLSA to publicly owned mass transit systems frustrates the achievement of these goals.

The poor, the elderly, and the handicapped are particularly dependent on publicly owned mass transit systems. A 1971 survey indicated that while 38 percent of people with incomes below $4,000 use bus services, only 28 percent of people with incomes over $15,000 ride buses.[5] A similar survey revealed that 70 percent of all bus and light-rail riders had incomes of $10,000 or less.[6] For the

---

[4]American Public Transit Association, *Transit Fact Book*, at 43 (1981 ed.).

[5]United States Department of Transportation, Urban Mass Transportation Administration, *Moving People, An Introduction To Public Transportation*, at 29 (1981).

[6]*Id.* at 35.

poor, many of whom do not own cars, publicly owned mass transit is the sole means of affordable transportation. Increased labor costs invariably lead to increased fares, which in turn make mass transit less accessible to those most dependent on it, the poor.

The elderly are similarly dependent on publicly owned mass transit. Many elderly individuals are physically unable to drive an automobile or have never learned to drive. In addition, many elderly individuals are too frightened to drive in congested urban areas or do not even own automobiles. As with the poor, the elderly are, to a large extent, dependent on publicly owned mass transit for their transportation.

Section 504 of the Rehabilitation Act[7] prohibits discrimination against the handicapped in any program receiving federal funds. In addition, § 16(a) of the Urban Mass Transportation Act[8] requires that "special efforts" be made to provide mass transportation to the elderly and handicapped. As these statutory commands are being implemented, more and more handicapped and elderly individuals will have access to publicly owned mass transit systems.

Besides providing transportation for special segments of the population, mass transit plays a crucial role in the economic development of municipalities and regional areas. For example, 78 percent of all office space constructed in San Francisco between 1962 and 1970 was constructed within a five-minute walk of Bay Area Rapid

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[7]29 U.S.C. §794.

[8]49 U.S.C. §1612(a) (1976 & Supp. V. 1981).

Transit stations.[9] Similar developments have occurred in Chicago, Boston, and Philadelphia.[10] In the Washington D.C. area, municipal governments are clustering development projects around nearby Metrorail stations. It has been estimated that the subway system in Washington, D.C. will itself generate $6 billion worth of private development projects. The rapid transit system in San Francisco was estimated to have generated $1.4 billion worth of construction activity in that city.[11] For businesses considering relocating, proximity to mass transit is a primary factor in choosing a new site.[12]

The heightened economic activity caused by publicly owned mass transit is crucial to the financial viability of many metropolitan areas. New investments create jobs, thereby lessening unemployment. In addition, the operation of a transit system itself creates numerous employment opportunities. Increased property values resulting from new development broaden the tax base and increase tax revenues. The improved economic climate benefits the entire community.

Another benefit realized from mass transit is a significant reduction in air pollution. It has been estimated that for 1980 alone, mass transit reduced the amount of hydrocarbons by 15,000 tons, reduced carbon monoxide by 147,000 tons, reduced nitrogen oxide by 35,000 tons,

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[9] *Moving People, supra* note 5, at 31.

[10] "Public Transit and Downtown Development," *Metropolitan,* at 48 (May-June 1980).

[11] *Transit Fact Book, supra* note 4, at 22.

[12] *Moving People, supra* note 5, at 31; "Trend: Moving Offices to Where Transit Is", *Passenger Transport,* at 1 (December 8, 1971); *Transit Fact Book, supra* note 4, at 22.

and reduced particulate matter by 5,000 tons.[13] If 50 people ride a bus instead of drive, air pollution is reduced by 10 to 25 times.[14]

Energy conservation is a goal similarly served by mass transit operations. In 1980, the use of mass transit saved almost 40 million barrels of petroleum fuel.[15] As transit use increases, this figure will inevitably increase. In addition, should the Nation again be victimized by an energy crisis, urban areas will be dependent on publicly owned mass transit systems to bring people to work and to business shopping districts.

C. History Demonstrates That Mass Transit Operations Are Traditionally Matters Of State And Local Concern.

Historically, mass transit operations have been a matter of state and local concern. Initially, transportation systems were owned and operated by the private sector, but state and local governments have always been responsible for granting franchises and regulating routes, fares, schedules, and safety.[16] There is no similar history of federal regulation of transit operations, and even today mass transit regulation is primarily a local concern.

Over the last several decades state and local governments had to take over the operations of mass transit

[13] *Transit Fact Book, supra* note 4, at 38.

[14] *Moving People, supra* note 5, at 31.

[15] *Transit Fact Book, supra* note 4, at 25. 0.15 gallons of gasoline are saved for each trip on a transit vehicle instead of by automobile.

[16] *Munn v. Illinois,* 94 U.S. 113, 125 (1876): "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen . . . and in so doing to fix a maximum charge to be made for services rendered. . . ."

systems directly rather than to continue merely to regulate transit operations. Whereas mass transit operations used to be profit-making enterprises, it became apparent that if reasonably priced, universal, and dependable public transit was to exist, government ownership was required because transit operations were no longer profitable.[17]

Several factors have been identified as contributing to the decline of private mass transit operations. The general migration from the central city into the suburbs was greatly responsible for the decline in ridership from 13.8 billion passengers in 1950 to only 5.7 billion passengers in 1977.[18] At the same time that ridership was decreasing, the operating costs per transit mile were increasing at twice the annual rate of inflation.[19]

Aside from decreasing ridership and inflationary pressures, the other major causes of the decreased profitability of mass transit were rising labor costs, the use of public transportation to help meet social and environmental goals, and the high costs attendant to moving high concentrations of riders during peak rush hours.[20]

Private transit companies could cope with these increased costs in ways that only would serve to harm the public. The private companies could raise fares, cut ser-

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[17]". . . [I]n recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service. . . ." National Mass Transportation Assistance Act of 1974, 49 U.S.C.A. §1601(4).

[18]*Moving People, supra* note 5, at 17.

[19]United States Department of Transportation, Urban Mass Transportation Administration, Institute of Public Administration, *Financing Transit: Alternatives For Local Government*, 8, 9 (July 1979).

[20]*Moving People, supra* note 5, at 17-19.

vices, reduce maintenance, or refuse to make necessary capital expenditures. The state and local governments responsible for ensuring that adequate transportation systems existed were faced with two choices. Either stand by as the private systems folded or reduced services, or, instead, move from being regulators of local transit operations to being providers of transit services. The state and local governments chose to provide for transit services themselves.

With public ownership of transit operations, the profit motive has disappeared as a factor in providing mass transit.[21] Low cost, universal, efficient mass transit operations are in existence today solely because state and local governments own and operate transit systems.

II. THE INTEREST OF STATE AND LOCAL GOVERNMENTS IN PROVIDING EFFICIENT AND REASONABLY PRICED TRANSIT SERVICES TO THEIR CITIZENS FAR OUTWEIGHS THE MINIMAL FEDERAL INTEREST IN IMPOSING THE FLSA ON PUBLIC TRANSIT SYSTEMS

The interests of the state and local governments far outweigh the minimal federal interest in this matter.

As noted earlier, mass transit is often the sole source of transportation for the poor, elderly, and handicapped. In addition, mass transit plays a crucial role in local economic development and land use planning. Mass tran-

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[21] In 1980, fare revenues accounted for only 40 percent of the total operating revenues of transit systems. *Transit Fact Book, supra* note 4, at 45. Thus, transit fares would have to be increased by 2½ times in order for fares to equal costs. A 10 percent increase in fares reduces ridership by 3 percent. *Moving People, supra* note 5, at 25.

sit also plays a crucial role in reducing air pollution and conserving energy.

The application of the FLSA to publicly owned mass transit systems frustrates and impedes these local objectives. The increased costs imposed on public transit systems by the FLSA reduce both the quality and quantity of the services provided.

Wages for maintenance personnel, drivers, and administrative workers account for 80 percent of the cost of operating public transportation.[22] Labor costs alone are estimated to have accounted for over one-third of the total rise in transit costs since 1970.[23]

In 1980, preliminary studies indicated that the salary and wages of transit employees totalled just over $3 billion.[24] Each 1 percent increase in labor costs increases by $30 million the direct labor costs to public transit systems. In addition, a mere 1 percent increase in wages is, on average, matched by a 3.3 percent increase in fringe benefits and a 4.6 percent increase in premium and non-operating time payments.[25] The application of the FLSA to local transit systems therefore would impose substantial financial costs at a time when such systems are already operating at a combined deficit of almost $4 billion,[26] and when intense public pressure makes raising fares either impossible or counterproductive.[27]

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[22] *Moving People, supra* note 5, at 18.

[23] *Id.*

[24] *Transit Fact Book, supra* note 4, at 66.

[25] *Moving People, supra* note 5, at 18.

[26] *Transit Fact Book, supra* note 4, at 44. Deficits are measured by subtracting operating revenues from total expenses.

[27] See note 21, *supra.*

Increased costs are not the only adverse effect which compliance with the FLSA will cause publicly owned mass transit systems. The overtime provisions and their attendant costs will interfere with the manner in which mass transit services are provided. In order to avoid the increased overtime costs required by the FLSA, transit systems will have to alter working schedules to limit employee overtime. This could very well restrict the routes served by public mass transit systems. The minimum wage provisions might limit the number of low-skilled minority employees a system can employ, and might prevent or limit the employment of teenagers during the summer months.[28]

Simply stated, the FLSA coerces state and local governments into structuring employment practices in a manner that is harmful to the best interests of the overwhelming majority of the citizenry. Faced with increased costs, public transit systems must raise fares or decrease services. Raising fares makes the system less accessible to those who need it most, the poor; raising fares also decreases ridership and thereby lessens the overall benefits of transit operations.[29] Reducing services at a time when increased services are demanded is obviously not in the public interest.

The federal interest in applying the FLSA to publicly owned mass transit systems is minimal because transit employees are already very well paid. Between 1970 and 1977, wages in the transit industry rose by 61 percent and, by 1976, transit workers had the *highest* average earnings of any segment of public sector employees.[30]

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[28] *National League of Cities*, 426 U.S. at 846-49.

[29] *Moving People, supra*, note 5, at 18.

[30] *Id.* In 1976, the average wage was $16,032 per year.

In addition, transit workers generally have the benefit of collective bargaining to protect their rights.[31] It has been estimated by the American Public Transit Association that over 80 percent of public transit employees are unionized.

The combination of high wages and collective bargaining representation demonstrates that the federal interest in imposing the FLSA on publicly owned transit systems is minimal.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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[31]Urban Mass Transportation Act of 1964, 49 U.S.C. §1609(c) (1976 & Supp V. 1981), requires protection of transit employee rights in systems receiving federal aid.

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December 1983

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Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers [NIMLO], pursuant to rule 36.4, moves the Court for leave to file the attached brief as *amicus curiae* in support of the appellees, San Antonio Metropolitan Transit Authority, *et al.* This motion and brief is filed on behalf of NIMLO and the local governments whose chief legal officers have signed the brief.

NIMLO submits that its brief can assist the Court in evaluating the importance of mass transit operations to local governments. In addition, the brief can assist the Court in determining the suitability of publicly owned mass transit systems for Tenth Amendment protection from federal encroachment. NIMLO's interest in this case is set out in the Interest of the Amicus Curiae section of the attached brief. That brief sets out facts demonstrating the essential nature of mass transit operations to local governments and shows the historic relationship between state and local governments and mass transit systems.

Because of the increasing role of public ownership of transit operations, this case is of nationwide importance, and, we submit, the attached *amicus curiae* brief will assist the Court in evaluating the nationwide importance and impact of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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December 1983

Appellee San Antonio Metropolitan Transit Authority, has withheld consent.

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On Appeals From The United States District Court For The Western District Of Texas

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1,600 local governments, or political subdivisions of states, which are members of the National Institute of Municipal Law Officers [NIMLO]. The member local governments operate NIMLO through their chief legal officers, variously called city attorney, county attorney, corporation counsel, city solicitor, director of law, and other

titles. Each member local government has one vote on all actions taken by the NIMLO organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local governments and the chief legal officers of the members of NIMLO in their official capacity. San Antonio, Texas is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization that provides information and research to its member local governments on current legal problems of local concern, including mass transit labor issues and issues involving federal-local relations.

The local government attorneys who participate in NIMLO's work are responsible for negotiating and drafting labor contracts with municipal employee unions, including mass transit employee unions. The attorneys are also intimately involved in the budgetary processes of local governments, and are responsible for advising local governments on the applicability of federal statutes and regulations to municipal mass transit activities.

NIMLO is greatly concerned that a reversal of the opinion below will result in a combination of an increase in transit rates for the tens of millions of transit riders in this Nation and a reduction in the quality and quantity of the mass transit services provided. Those least able to pay the increased fares, the poor and the elderly, will be harmed the most. NIMLO is equally concerned that an adverse ruling will deprive state and local governments of the right to regulate, free from federal intrusion, the wages and hours of their employees providing other traditional and essential governmental services. The Tenth Amendment guarantees them this right. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

NIMLO, therefore, respectfully urges this Court to affirm the opinion below that mass transit is a traditional governmental function entitled to Tenth Amendment immunity. This will protect the transit riding public from harm and preserve the independent integrity of state and local governments that is essential to the operation of our federalist system.

STATEMENT OF THE CASE

The Statement of the Case set forth in Appellee American Public Transit Association's Motion to Affirm is adopted by the National Institute of Municipal Law Officers for purposes of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

Publicly owned mass transit systems today are the predominant providers of mass transit services. Mass transit has become an integral component of state and local government land use planning, and it serves crucial environmental, social, and economic goals.

Historically, mass transit has been a concern of state and local governments, with minimal federal intrusion. State and local governments have long been involved with mass transit systems as franchisors and regulators, but severe economic problems, coupled with the desire to increase the scope of services provided by mass transit, have recently compelled governmental takeovers of regulated private transit operations.

Mass transit today is a traditional and integral function of state and local government. The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) [FLSA],

impermissibly imposes federal minimum wage and maximum hour regulations on local mass transit operations. The imposition of the FLSA on local public transit operations places a severe financial burden on local transit systems and directly imposes hardships on all classes of transit riders, but especially the poor and the elderly.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the minimum wage and maximum hours provisions of the FLSA could not constitutionally be applied to the integral and traditional operations of state and local governments. When Congress attempts to displace directly the state and local governments' freedom to structure integral operations in areas of traditional governmental functions, it exceeds its grant of authority under the Commerce Clause.[1]

The basic holding of *National League of Cities* has been reaffirmed by this Court on numerous occasions, most recently last Term in *EEOC v. Wyoming*, 103 S.Ct. 1054 (1983). See also *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island Railroad Company*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).

An examination into the current role of state and local governments in mass transit operations compels the conclusion that the operation of publicly owned mass transit systems is today a traditional governmental function. A study of the historical role played by state and local governments in transit operations buttresses this conclusion. Therefore, Congress' attempt to impose FLSA rules and regulations on publicly owned mass transit systems exceeds its authority under the Commerce Clause.

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[1]U.S. CONST. art. I, § 8, cl. 3.

ARGUMENT

I. THE OPERATION OF PUBLICLY OWNED MASS TRANSIT SYSTEMS IS AN INTEGRAL AND TRADITIONAL FUNCTION OF STATE AND LOCAL GOVERNMENT

A. Mass Transit Today Is A Service Provided Almost Exclusively By State And Local Governments.

The term "traditional" has a variety of meanings, depending in part on the context of the particular issue. While the term "traditional" does imply an historic component, within the context of Tenth Amendment analysis "traditional" is not inexorably entwined with history. In fact, a strictly historic view of traditional functions has been explicitly rejected by this Court. *Long Island Railroad,* 455 U.S. at 686-87.[2]

Traditional, therefore, implies more than historical. A traditional function is a practice that is customary, common, pervasive, or routine. Under this kind of analysis, it is clear that in the area of mass transit operations, public ownership is a traditional governmental function. More than 250 of the 279 urbanized areas with populations over 50,000 people are served in whole or in part by publicly owned mass transit systems. Each of the 50 largest metropolitan areas is served by a publicly owned mass transit system.[3]

---

[2]"This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." *Long Island Railroad,* 455 U.S. at 686-87.

[3]United States Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population,* at 1-12 (Aug. 1981).

An analysis of ridership statistics further demonstrates the predominance of state and local governments in mass transit operations. Ninety-four percent of all transit riders are carried on publicly owned mass transit systems. Ninety percent of all transit vehicles are owned and operated by public transit systems and these vehicles travel 93 percent of all the miles travelled by mass transit vehicles.[4]

B. Publicly Owned Mass Transit Systems Serve Important Local Goals.

Mass transit has become an important means of achieving governmental social, economic and environmental goals, such as serving special segments of society unable to afford other means of transportation, pollution control, energy conservation, and economic development and planning. These benefits accrue not just to transit riders, but to the public as a whole. The increased costs attendant upon application of the FLSA to publicly owned mass transit systems frustrates the achievement of these goals.

The poor, the elderly, and the handicapped are particularly dependent on publicly owned mass transit systems. A 1971 survey indicated that while 38 percent of people with incomes below $4,000 use bus services, only 28 percent of people with incomes over $15,000 ride buses.[5] A similar survey revealed that 70 percent of all bus and light-rail riders had incomes of $10,000 or less.[6] For the

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[4]American Public Transit Association, *Transit Fact Book*, at 43 (1981 ed.).

[5]United States Department of Transportation, Urban Mass Transportation Administration, *Moving People, An Introduction To Public Transportation*, at 29 (1981).

[6]*Id.* at 35.

poor, many of whom do not own cars, publicly owned mass transit is the sole means of affordable transportation. Increased labor costs invariably lead to increased fares, which in turn make mass transit less accessible to those most dependent on it, the poor.

The elderly are similarly dependent on publicly owned mass transit. Many elderly individuals are physically unable to drive an automobile or have never learned to drive. In addition, many elderly individuals are too frightened to drive in congested urban areas or do not even own automobiles. As with the poor, the elderly are, to a large extent, dependent on publicly owned mass transit for their transportation.

Section 504 of the Rehabilitation Act[7] prohibits discrimination against the handicapped in any program receiving federal funds. In addition, § 16(a) of the Urban Mass Transportation Act[8] requires that "special efforts" be made to provide mass transportation to the elderly and handicapped. As these statutory commands are being implemented, more and more handicapped and elderly individuals will have access to publicly owned mass transit systems.

Besides providing transportation for special segments of the population, mass transit plays a crucial role in the economic development of municipalities and regional areas. For example, 78 percent of all office space constructed in San Francisco between 1962 and 1970 was constructed within a five-minute walk of Bay Area Rapid

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[7] 29 U.S.C. §794.

[8] 49 U.S.C. §1612(a) (1976 & Supp. V. 1981).

Transit stations.[9] Similar developments have occurred in Chicago, Boston, and Philadelphia.[10] In the Washington D.C. area, municipal governments are clustering development projects around nearby Metrorail stations. It has been estimated that the subway system in Washington, D.C. will itself generate $6 billion worth of private development projects. The rapid transit system in San Francisco was estimated to have generated $1.4 billion worth of construction activity in that city.[11] For businesses considering relocating, proximity to mass transit is a primary factor in choosing a new site.[12]

The heightened economic activity caused by publicly owned mass transit is crucial to the financial viability of many metropolitan areas. New investments create jobs, thereby lessening unemployment. In addition, the operation of a transit system itself creates numerous employment opportunities. Increased property values resulting from new development broaden the tax base and increase tax revenues. The improved economic climate benefits the entire community.

Another benefit realized from mass transit is a significant reduction in air pollution. It has been estimated that for 1980 alone, mass transit reduced the amount of hydrocarbons by 15,000 tons, reduced carbon monoxide by 147,000 tons, reduced nitrogen oxide by 35,000 tons,

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[9] *Moving People, supra* note 5, at 31.

[10] "Public Transit and Downtown Development," *Metropolitan,* at 48 (May-June 1980).

[11] *Transit Fact Book, supra* note 4, at 22.

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and reduced particulate matter by 5,000 tons.[13] If 50 people ride a bus instead of drive, air pollution is reduced by 10 to 25 times.[14]

Energy conservation is a goal similarly served by mass transit operations. In 1980, the use of mass transit saved almost 40 million barrels of petroleum fuel.[15] As transit use increases, this figure will inevitably increase. In addition, should the Nation again be victimized by an energy crisis, urban areas will be dependent on publicly owned mass transit systems to bring people to work and to business shopping districts.

C. History Demonstrates That Mass Transit Operations Are Traditionally Matters Of State And Local Concern.

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[14] *Moving People, supra* note 5, at 31.

[15] *Transit Fact Book, supra* note 4, at 25. 0.15 gallons of gasoline are saved for each trip on a transit vehicle instead of by automobile.

[16] *Munn v. Illinois*, 94 U.S. 113, 125 (1876): "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen . . . and in so doing to fix a maximum charge to be made for services rendered. . . ."

systems directly rather than to continue merely to regulate transit operations. Whereas mass transit operations used to be profit-making enterprises, it became apparent that if reasonably priced, universal, and dependable public transit was to exist, government ownership was required because transit operations were no longer profitable.[17]

Several factors have been identified as contributing to the decline of private mass transit operations. The general migration from the central city into the suburbs was greatly responsible for the decline in ridership from 13.8 billion passengers in 1950 to only 5.7 billion passengers in 1977.[18] At the same time that ridership was decreasing, the operating costs per transit mile were increasing at twice the annual rate of inflation.[19]

Aside from decreasing ridership and inflationary pressures, the other major causes of the decreased profitability of mass transit were rising labor costs, the use of public transportation to help meet social and environmental goals, and the high costs attendant to moving high concentrations of riders during peak rush hours.[20]

Private transit companies could cope with these increased costs in ways that only would serve to harm the public. The private companies could raise fares, cut ser-

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[17]". . . [I]n recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service. . . ." National Mass Transportation Assistance Act of 1974, 49 U.S.C.A. §1601(4).

[18]*Moving People, supra* note 5, at 17.

[19]United States Department of Transportation, Urban Mass Transportation Administration, Institute of Public Administration, *Financing Transit: Alternatives For Local Government,* 8, 9 (July 1979).

[20]*Moving People, supra* note 5, at 17-19.

vices, reduce maintenance, or refuse to make necessary capital expenditures. The state and local governments responsible for ensuring that adequate transportation systems existed were faced with two choices. Either stand by as the private systems folded or reduced services, or, instead, move from being regulators of local transit operations to being providers of transit services. The state and local governments chose to provide for transit services themselves.

With public ownership of transit operations, the profit motive has disappeared as a factor in providing mass transit.[21] Low cost, universal, efficient mass transit operations are in existence today solely because state and local governments own and operate transit systems.

II. THE INTEREST OF STATE AND LOCAL GOVERNMENTS IN PROVIDING EFFICIENT AND REASONABLY PRICED TRANSIT SERVICES TO THEIR CITIZENS FAR OUTWEIGHS THE MINIMAL FEDERAL INTEREST IN IMPOSING THE FLSA ON PUBLIC TRANSIT SYSTEMS

The interests of the state and local governments far outweigh the minimal federal interest in this matter.

As noted earlier, mass transit is often the sole source of transportation for the poor, elderly, and handicapped. In addition, mass transit plays a crucial role in local economic development and land use planning. Mass tran-

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[21] In 1980, fare revenues accounted for only 40 percent of the total operating revenues of transit systems. *Transit Fact Book, supra* note 4, at 45. Thus, transit fares would have to be increased by 2½ times in order for fares to equal costs. A 10 percent increase in fares reduces ridership by 3 percent. *Moving People, supra* note 5, at 25.

sit also plays a crucial role in reducing air pollution and conserving energy.

The application of the FLSA to publicly owned mass transit systems frustrates and impedes these local objectives. The increased costs imposed on public transit systems by the FLSA reduce both the quality and quantity of the services provided.

Wages for maintenance personnel, drivers, and administrative workers account for 80 percent of the cost of operating public transportation.[22] Labor costs alone are estimated to have accounted for over one-third of the total rise in transit costs since 1970.[23]

In 1980, preliminary studies indicated that the salary and wages of transit employees totalled just over $3 billion.[24] Each 1 percent increase in labor costs increases by $30 million the direct labor costs to public transit systems. In addition, a mere 1 percent increase in wages is, on average, matched by a 3.3 percent increase in fringe benefits and a 4.6 percent increase in premium and non-operating time payments.[25] The application of the FLSA to local transit systems therefore would impose substantial financial costs at a time when such systems are already operating at a combined deficit of almost $4 billion,[26] and when intense public pressure makes raising fares either impossible or counterproductive.[27]

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[22] *Moving People, supra* note 5, at 18.

[23] *Id.*

[24] *Transit Fact Book, supra* note 4, at 66.

[25] *Moving People, supra* note 5, at 18.

[26] *Transit Fact Book, supra* note 4, at 44. Deficits are measured by subtracting operating revenues from total expenses.

[27] See note 21, *supra.*

Increased costs are not the only adverse effect which compliance with the FLSA will cause publicly owned mass transit systems. The overtime provisions and their attendant costs will interfere with the manner in which mass transit services are provided. In order to avoid the increased overtime costs required by the FLSA, transit systems will have to alter working schedules to limit employee overtime. This could very well restrict the routes served by public mass transit systems. The minimum wage provisions might limit the number of low-skilled minority employees a system can employ, and might prevent or limit the employment of teenagers during the summer months.[28]

Simply stated, the FLSA coerces state and local governments into structuring employment practices in a manner that is harmful to the best interests of the overwhelming majority of the citizenry. Faced with increased costs, public transit systems must raise fares or decrease services. Raising fares makes the system less accessible to those who need it most, the poor; raising fares also decreases ridership and thereby lessens the overall benefits of transit operations.[29] Reducing services at a time when increased services are demanded is obviously not in the public interest.

The federal interest in applying the FLSA to publicly owned mass transit systems is minimal because transit employees are already very well paid. Between 1970 and 1977, wages in the transit industry rose by 61 percent and, by 1976, transit workers had the *highest* average earnings of any segment of public sector employees.[30]

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[28] *National League of Cities*, 426 U.S. at 846-49.

[29] *Moving People, supra*, note 5, at 18.

[30] *Id.* In 1976, the average wage was $16,032 per year.

In addition, transit workers generally have the benefit of collective bargaining to protect their rights.[31] It has been estimated by the American Public Transit Association that over 80 percent of public transit employees are unionized.

The combination of high wages and collective bargaining representation demonstrates that the federal interest in imposing the FLSA on publicly owned transit systems is minimal.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers respectfully urges this Court to affirm the decision below.

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[31] Urban Mass Transportation Act of 1964, 49 U.S.C. §1609(c) (1976 & Supp V. 1981), requires protection of transit employee rights in systems receiving federal aid.

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Nos. 82-1951 and 82-1913

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

JOE G. GARCIA,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

On Appeals from the United States District Court for the Western District of Texas

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BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION

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QUESTIONS PRESENTED

1. *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore constitutionally cannot be applied to integral activities in areas of traditional governmental functions. Are publicly owned local mass transit services integral activities in areas of traditional governmental functions, thus precluding the application of these federal statutory provisions to them?

2. Did *National League of Cities* find unconstitutional so much of Congress' intended coverage of state and local governmental functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unwarranted to apply these requirements to publicly owned local mass transit systems without new congressional enactment?

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Appellees

On Appeals from the United States District Court for the Western District of Texas

---

BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION

STATEMENT OF THE CASE

The sole issue in this case is whether local publicly owned mass transit services are integral activities in areas of traditional state and local governmental func-

tions. For this Court has already decided that the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) ("FLSA"), fixing minimum wages and overtime compensation interfere with an essential attribute of state sovereignty and therefore may not be applied to state and local government employees performing such functions. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The relevant facts are:

1. The City of San Antonio established a publicly owned local mass transit system in 1959.[1] In 1978, appellee, the publicly owned San Antonio Metropolitan Transit Authority ("SAMTA") acquired the assets of the transit system from the city and now provides local public transit services to the city and most of Bexar County, Texas. SAMTA, a political subdivision of the State of Texas, according to state law, is "exercising public and essential governmental functions." Tex. Rev. Civ. Stat. Ann. art. 1118x § 6(a) (Vernon Supp. 1982). SAMTA provides bus service to the entire community at fares which cover only 25 percent of operating expenses. In addition, bus service is provided at reduced fares for school children, the elderly and the handicapped, and some downtown service has been provided free of charge. A local sales tax provides substantial revenues to meet operating expenses. Acquisition of the system by the city in 1959 and by SAMTA in 1978 was financed entirely by public bonds; no federal funds were used.

2. The publicly owned state and local transit agencies that will be affected by this decision are maintained by substantial state and local taxes to provide essential public services and an infrastructure that facilitates public

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[1] Facts concerning local transit in San Antonio are drawn from the Affidavit of Wayne M. Cooke, General Manager, San Antonio Metropolitan Transit Authority, R. 196-203.

movement throughout the community.[2] They are not operated for profit. Employees of these systems, nevertheless, have achieved—primarily through collective bargaining—almost the highest wages of any state and local government employees.[3] The average wage of employees of these agencies is $9.01 per hour.[4]

3. This case arises out of a dispute between the States and the federal government that has ensued since 1966, when Congress, acting pursuant to its Commerce Clause powers, amended the Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938), attempting for the first time to include a limited number of state activities within its coverage.[5] Although the FLSA was enacted in 1938, it was not until 1961 that Congress extended the minimum wage requirements to *private* transit employees. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72. In 1966, Congress for the first time extended some FLSA coverage to public as well as private providers of schools, institutions, hospitals, and some employees of local mass transit.[6] The practical implications for local publicly owned transit

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[2] *See infra* pp. 16-20.

[3] U.S. Department of Commerce, *Public Employment in 1982*, Table 4 at 12 (1983).

[4] U.S. Department of Labor, *Union Wages and Benefits: Local Transit Operating Employees*, Table 2 at 4 (1981). *See also* Amalgamated Transit Union, Research Department Bulletin 5 (Nov. 1983).

[5] The only provisions of the FLSA at issue in this case are the minimum wage and overtime compensation requirements that were addressed in *National League of Cities v. Usery*, 426 U.S. 833 (1976); contrary to federal appellant's implications, Brief for Federal Appellant ("U.S. Br.") 2 n.2, 3 n.5, 44, the child labor provisions are not at issue.

[6] Local mass transit was described as "street, suburban or interurban electric railway, or local trolley or motorbus carrier[s]" subject to state or local regulation, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830, 831. Street

were limited because the 1966 amendments specifically exempted most transit employees—operators, drivers and conductors—from the overtime compensation provisions of the Act, Pub. L. No. 89-601, § 206, 80 Stat. 830, 836. In 1974, after this Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968), had upheld the FLSA's coverage of some state activities, Congress, which reasonably would have assumed that it had unlimited power under the Commerce Clause to apply the FLSA to all state employees, further amended the statute to cover almost all employees of state and local governments in areas where private employers were already covered. *See National League of Cities*, 426 U.S. at 838-39. Only at this time did Congress seek to phase in over a two-year period the provision in the statute most troubling to public transit systems, the overtime requirements for private or public transit operators. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

State and local governments successfully challenged the 1974 amendments in *National League of Cities*. This Court held that the FLSA wage and hour provisions cannot be applied constitutionally to most activities of state and local governments. Expressly overruling *Wirtz*, the Court cited several examples of the numerous state activities affected by its decision, but did not specifically include or exclude publicly owned local mass transit services.

4. Federal appellant first indicated its intent to apply the FLSA to publicly owned local mass transit services over three years after *National League of Cities* was decided, in a letter to a transit union dated September 17,

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electric railways are a form of local transit as are trolleys and buses. Historically they have not been part of the national main-line railroad system, unlike commuter railroads, *see* American Public Transit Association, *Transit Fact Book* 72 (1981) ("*Transit Fact Book*").

1979.[7] SAMTA learned of the letter and filed suit on November 21, 1979 seeking a declaratory judgment that the proposed application of the FLSA was unconstitutional.[8] On December 21, 1979, the Department of Labor ("DOL") formally amended its FLSA regulations—without any public notice or comment—to assert that local publicly owned mass transit agencies do not perform integral operations in areas of traditional governmental functions and therefore are subject to the FLSA. 44 Fed. Reg. 75,630 (1979); 29 C.F.R. § 775.3(b) (1983).[9]

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[7] Letter from the Deputy Administrator of the United States Department of Labor to the Amalgamated Transit Union (September 17, 1979), R. 163-66.

[8] While this is the only case involving this issue in which a declaratory judgment against the federal government was sought, the issue has been raised in other federal appellate courts. *Compare, e.g., Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982) (concluding that the FLSA may not be applied to a state highway and transit authority) *with Alewine v. City Council of Augusta*, 699 F.2d 1060 (11th Cir. 1983), *petitions for cert. filed*, 51 U.S.L.W. 3884 (U.S. June 3, 1983) (No. 82-1974), 52 U.S.L.W. 3141 (U.S. Aug. 17, 1983) (No. 83-257), *and Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983) (concluding that the FLSA may be applied to local publicly owned mass transit systems). *See also Dove v. Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983) (reversing grant of summary judgment for transit agency and remanding for further proceedings); *Scholz v. City of LaCrosse*, No. 82-2290 (7th Cir. April 11, 1983) (order granting stay of proceedings pending this Court's ruling in these consolidated cases).

[9] DOL listed along with publicly owned local mass transit the following state owned functions to which it believes the FLSA applies: off-track betting corporations, generation and distribution of electric power, provision of residential and commercial telephone and telegraphic communication, production and sale of organic fertilizer as a by-product of sewage processing, production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b) (1983). The regulations also state that the FLSA should *not* be applied to public libraries and museums. 29 C.F.R. § 775.4(b) (1983).

The American Public Transit Association ("APTA"), the members of which include most publicly owned local mass transit systems, intervened. Federal appellant also counterclaimed on behalf of SAMTA's employees for back pay [10] and injunctive relief. An employee, Joe G. Garcia, intervened.

The district court granted SAMTA's and APTA's motions for summary judgment on November 17, 1981, ruling that local public mass transit systems (including SAMTA) are "integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976)." Appendix to Jurisdictional Statement for Federal Appellant ("U.S.J.S.") 23a. Appellants here appealed directly to this Court pursuant to 28 U.S.C. § 1252 (1976). The Court vacated the judgment and remanded the case "for further consideration in light of [the later-decided] *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) [("*LIRR*")]." *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

5. After further briefing and oral argument, the district court found that its previous conclusion that "operation of a public transit system is a governmental function entitled to Tenth Amendment immunity," was fully consistent with this Court's decision in *LIRR* and reentered judgment for SAMTA and APTA. U.S.J.S. 2a.[11]

6. Appellants again appealed to this Court pursuant to 28 U.S.C. § 1252 (1976).

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[10] The FLSA authorizes the Secretary of Labor to seek back pay for employees and liquidated damages in an equal amount for up to three years if an employer did not compensate employees in the manner established by the FLSA. 29 U.S.C. § 216(c) (1976 & Supp. V 1981).

[11] The court's order of February 14, 1983 was withdrawn and reentered effective on that date on February 18, 1983 to correct typographical errors.

SUMMARY OF ARGUMENT

National League of Cities held that the FLSA minimum wage and overtime compensation provisions—the specific provisions at issue here—may not be applied consistently with the Tenth Amendment to "integral portion[s] of those governmental services which the States and their political subdivisions have traditionally afforded their citizens," 426 U.S. at 855. This Court found that these wage and hour determinations are " 'functions essential to [the States'] separate and independent existence' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. *See also EEOC v. Wyoming*, 103 S. Ct. 1054, 1061 n.11 (1983) (reconfirming holding of *National League of Cities* that "[o]ne undoubted attribute of state sovereignty is the States' power to determine [wages, hours and overtime compensation for employees carrying] out governmental functions").

In subsequent decisions, this Court has addressed Tenth Amendment challenges to Congress' exercise of Commerce Clause power in statutory contexts other than the FLSA. In each case it distinguished the federal statutory provisions at issue in *National League of Cities*, consistently reaffirming that the FLSA wage and overtime provisions cannot constitutionally be applied to integral operations in areas of traditional functions of state and local government. *EEOC*, 103 S. Ct. at 1060; *FERC v. Mississippi*, 456 U.S. 742, 758-59 (1982); *LIRR*, 455 U.S. at 685; *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 (1981).

I. The only remaining issue in this case not expressly resolved by *National League of Cities* is whether local publicly owned mass transit services are "integral operations in areas of traditional governmental functions." 426 U.S. at 852.

Among these "important governmental activities," *id.* at 847, specifically identified in *National League of Cities*, are fire and police protection, sanitation, parks and recre-

ation, public health, schools, and hospitals, *id.* at 851, 855. Federal appellant has added museums and libraries. 44 Fed. Reg. 75,630 (1979); 29 C.F.R. § 775.4(b) (1983). The list, however, is "not an exhaustive catalogue," and there are in addition "numerous line and support activities" within the protected area. 426 U.S. at 851 n.16. The court below determined that local publicly owned mass transit, like the other functions enumerated by this Court, is a protected activity "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851.

A. From the inception of the Republic, one of the basic purposes for which communities have organized themselves into governments has been to provide a local transportation infrastructure. *See Molina-Estrada*, 680 F.2d at 845-46. As transportation technology has evolved, and as urban areas have become more congested (thereby necessitating that people join together to share transportation), the means by which state and local governments have met this transportation responsibility also has changed. In addition to the management of streets and highways, states and their political subdivisions have become the predominant providers of local mass transit services. About 90 percent of local transit revenues, total transit miles, and passenger trips are attributable to publicly owned local mass transit systems. Affidavit of Stanley G. Feinsod, Executive Director, Policy and Programs, American Public Transit Association ("Feinsod Affidavit") ¶ 4, R. 177. Local public transit systems serve the transportation needs of the entire community, including low-income residents, who constitute 80 percent of mass transit riders.[12] Such riders depend on public transit for access to jobs and to public health, education and other vital governmental services. Even community

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[12] This figure represents riders with an income of $15,000 or less. Urban Mass Transportation Administration, U.S. Department of Transportation, *Moving People, An Introduction to Public Transportation* 35 (1981).

residents who are neither poor nor regular transit riders benefit from the reduced traffic congestion, increased safety, cleaner air, and more rational and efficient land use that public transit makes possible. To attain these community-wide benefits, local publicly owned mass transit is provided as a public service and not for pecuniary gain; state and local assistance contributes 40 percent of operating revenues nationwide. *Transit Fact Book* 45. Fares provide only about 40 percent of such revenues, *id.*, and are substantially reduced for the elderly and students. *See infra* text accompanying note 20.

States increasingly have provided public mass transit because it is a service that "their citizens require," *National League of Cities*, 426 U.S. at 847, not to compete with private providers, but rather to contribute to a balanced local transportation infrastructure that is responsive to changing urban needs and public welfare demands. The planning, construction and operation of public transit facilities and services—from subway lines to bus routes—is an integral part of the local planning process and the management of streets and highways, which the States overwhelmingly "have regarded as integral parts of their governmental activities." *Id.* at 854 n.18.

B. Appellants argue that, although local mass transit has become a pervasively public function, this has not been true for an adequate historical period to qualify as a "traditional governmental function." *See* U.S. Br. 11, 16-20, 24-25, Brief for Appellant Garcia ("G. Br.") 15-17. This Court, however, has rejected such a "static historical view of state functions generally immune from regulation." *LIRR*, 455 U.S. at 686. Local mass transit, moreover, began to evolve into a public function of state and local governments early in the century when several major cities adopted this means of supplementing their transportation infrastructure shortly after transit technology was developed and the problems of urbanization began to emerge. Later in the century, fueled by an

expansive federal highway program, many middle class riders turned to the automobile and life in the suburbs, thus radically altering the transportation requirements of urban communities and accelerating the shift toward public provision of local mass transit services to meet these changing needs.

II. Failing to distinguish this case from *National League of Cities*, appellants unsuccessfully attempt to create a novel issue by invoking the authority of federal statutes other than the FLSA.

A. Appellants cite a few federal labor laws in an attempt to show that failure to apply FLSA requirements to local public transit systems would result in an unconstitutional erosion in an area of traditional federal regulatory authority within the meaning of *LIRR*. That case, however, involved a distinct and unique federal statutory scheme comprehensively regulating the national railroad network, both private and public, for nearly a century. *See infra* p. 28. Local mass transit, in contrast, has always been the primary responsibility of state and local governments and thus subject to comprehensive state statutory regulation. Furthermore, the federal statutes cited by appellants are general labor laws that apply to almost all private activities, including the private counterparts of activities expressly immunized in *National League of Cities*. Appellants cite, for example, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981) ("NLRA"), which applies to private schools, hospitals, and transit systems, but exempts public schools, hospitals, and transit systems.

B. Appellants next attempt to distinguish local public mass transit from the activities expressly protected by *National League of Cities* by claiming an extraordinary federal interest in this particular local public service by virtue of federal funding under the Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1618 (1976 & Supp. V 1981) ("UMTA"). But this Court has unanimously held

that Congress did not intend through UMTA "to create a body of federal law applicable to labor relations between local governmental entities and transit workers." *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 27 (1982). And similar programs of "cooperative federalism" enabling states to provide important public services exist for most of the activities cited in *National League of Cities*. Because of its greater revenue raising ability, the federal government has become a primary source of funds for virtually all essential state activities, *e.g.*, health, schools, sanitation, and law enforcement. It would be a confusion of the respective functions of each level of government in our federal system to conclude that the reach of Commerce Clause power over the States is commensurate with the federal ability to raise and spend monies. In fact, appellants seem to be urging this Court to imply that Congress properly exercised such broad Commerce Clause power in a statute passed pursuant to Congress' Spending Clause power. Such an implication of congressional intent goes well beyond implying conditions in federal grants to states, something this Court expressly identified as a threat to the federal system in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

III. In any event, since *National League of Cities* struck down most of the intended coverage of state and local governments by the FLSA wage and overtime compensation requirements, the statute may not now be read to allow coverage of a small class of public employees without subsequent amendment. *See Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

ARGUMENT

I. *National League Of Cities* Determined That The Fair Labor Standards Act Minimum Wage And Overtime Compensation Provisions May Not Be Applied To Integral Activities In Areas Of Traditional State And Local Governmental Functions.

As its subsequent decisions have made increasingly clear, this Court in *National League of Cities* has conclusively determined all but possibly one of the requirements for invalidating application of the FLSA to local publicly owned mass transit.[13] *See LIRR*, 455 U.S. at 684 n.9; *Hodel*, 452 U.S. at 287-88. In *Hodel*, this Court articulated the criteria that must be applied:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citations omitted; emphasis in original). The Court also noted:

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[13] *National League of Cities* was founded on an analysis of the limitiations imposed by the Tenth Amendment and our system of federalism on the otherwise legitimate exercise of congressional Commerce Clause powers; therefore, federal appellant cannot sidestep the constitutional issue here merely by declaring that the UMTA and the FLSA reflect the congressional belief that local mass transit has an "interstate impact" and that "[b]ecause of the direct impact of transit service on interstate commerce the FLSA may constitutionally be applied to public transit employees." U.S. Br. 46-47.

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission.

Id. at 288 n.29.

National League of Cities has already decided, first, that application of the FLSA to the States and their political subdivisions regulates the "States as States," 426 U.S. at 845. Second, it decided that the FLSA's regulation of minimum wage and overtime compensation for state and local employees addresses a matter that is an "undoubted attribute of state sovereignty." *Id.* Furthermore, as this Court recently confirmed in *LIRR*, *National League of Cities* has decided the fourth point, the balance between the federal and state interests, *see* 426 U.S. at 852-53; *see also id.* at 856 (Blackmun, J., concurring), and has determined that the nature of the federal interest advanced in the FLSA was not "so great as to 'justif[y] State submission.'" *LIRR*, 455 U.S. at 684 n.9 (quoting *Hodel*, 452 U.S. at 288 n.29).

Finally, the first aspect of the third requirement—whether the States' compliance with the federal law would "*directly impair their ability 'to structure* integral operations in areas of traditional governmental functions,'" *Hodel*, 452 U.S. at 288 (citation omitted; emphasis added)—is also resolved for this case by *National League of Cities*. There, this Court held that applying the very same FLSA provisions to integral operations in areas of traditional governmental functions would "*impermissibly interfere*" with an essential attribute of state sovereignty, leaving little of the "States' 'separate and independent existence,'" 426 U.S. at 851 (citation omitted; emphasis added).[14] *National League of Cities*

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[14] Contrary to federal appellant's suggestion, U.S. Br. 43-45, when this Court in *National League of Cities* asked whether imposi-

has already established that federal displacement of the States' prerogative to establish wages and overtime compensation for employees engaged in areas of traditional functions would impair the States' " 'ability to function effectively in a federal system,' " *id.* at 852 (citation omitted).

As this Court reaffirmed in *EEOC*, "*National League of Cities* held that 'there are attributes of sovereignty attaching to every state government which may not be impaired by Congress' and that '[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime.' 426 U.S. at 845." 103 S. Ct. at 1061 n.11. Thus, *National League of Cities* has decided part of the final test, leaving unresolved only whether local publicly owned mass transit is an integral part of a traditional function of state and local government.[15] The court below correctly answered in the affirmative.

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tion of a federal regulation would endanger the States' "separate and independent existence" it called for an evaluation of the effect on state sovereignty of the FLSA's displacement of state policy choices regarding wages and hours. It did not call for consideration of whether the States' provision of certain services, *e.g.*, transit, parks, or hospitals, is essential to the States' "separate and independent existence," *id.* As the Court reaffirmed in *EEOC*, "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 103 S. Ct. at 1062 (citation omitted). It is this encroachment that threatens state sovereignty; *National League of Cities* does not require a showing that state sovereignty is threatened if a state does not provide, for example, public hospitals, parks, museums, libraries or transit.

[15] This issue, in keeping with the explicit suggestion of the federal government in that case, was not addressed by the Court in *LIRR*. *See infra* note 38.

A. Publicly Owned Local Mass Transit Is An Integral Activity In An Area Of Traditional State And Local Governmental Functions.

As the district court concluded, the provision of publicly owned local mass transit services is as integral to the public responsibility of state and local government as are "fire prevention, police protection, sanitation, public health, and parks and recreation," *National League of Cities*, 426 U.S. at 851, and schools and hospitals, *id.* at 855, which, while "obviously not an exhaustive catalogue," *id.* at 851 n.16, this Court has held are "typical" examples of the "numerous line and support activities which are well within the area of traditional operations of state and local governments," *id.*[16]

A city's transportation infrastructure contains transportation routes which, like the veins and arteries of the human cardiovascular system, provide the paths for the lifeblood of its object, facilitating circulation and nourishing those areas the lines reach. If any are blocked, the area they serve—or sometimes even the entire object—

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[16] While distinctions can be drawn between publicly owned local transit and the activities enumerated in *National League of Cities*, and "[w]hile there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected [in *National League of Cities*], each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities*, 426 U.S. at 855 (footnote omitted). Lacking any constitutionally significant basis for distinguishing local publicly owned transit services from other essential public services expressly protected by *National League of Cities*, Appellant Garcia urges this Court to limit the reach of immunity from FLSA coverage to law enforcement officers, G. Br. 23, which presumably would eliminate Tenth Amendment immunity for most employees of schools, hospitals, parks, recreation and so forth. But this Court more thoughtfully has sought to isolate for exemption from the FLSA those areas of governmental services that are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

deteriorates and dies. A local transportation network is thus essential to the life of any community, and the management of such a network is one of the sovereign purposes for which state and local governments exist.

These governments have regarded the use of publicly owned local mass transit as an integral and often essential means of performing this traditional governmental function.[17] Buses and subways are necessary to transport middle and lower income people to work—people who cannot afford an automobile or city-center parking fees. Buses or subways are necessary to transport children to integrated schools across town or the single high school in a rural school district. Buses or subways are necessary to enable senior citizens at a reduced fare occasionally to go to a department store or downtown cafeteria. Buses or subways are necessary to bring people to work or shop in a redeveloped neighborhood so that businesses are willing to locate there and residents willing to buy and renovate homes. Even for persons who are not regular riders, public transit is necessary to relieve traffic congestion and foster safe streets and a more livable environment. The life of communities is, and always has been, entirely dependent on publicly provided means of movement between home, work and shops and, in urban areas in particular, this dependency has long meant providing local mass transit services as well as providing streets and roads. Public mass transit therefore is an integral part of a traditional—indeed critical—function of state and local government, which is at least as important to the health and survival of a community as are

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[17] Indeed, federal appellant acknowledges as much, U.S. Br. 29-30, by quoting the director of the Atlanta Region Metropolitan Planning Commission as stating that local government officials believe that in addition to highway programs their communities must have "a completely balanced transportation system" which includes public mass transit. *Cf. Molina-Estrada*, 680 F.2d at 845.

the functions expressly protected in *National League of Cities.*[18]

For this reason, public transit agencies are organizationally integrated or closely coordinated with other essential local governmental services such as street and traffic management, public works, land use planning and zoning—often under the umbrella of a common city department or regional authority. Feinsod Affidavit ¶ 11, R. 183-86. Decisions about where, how and when to condemn land to build a subway line or urban expressway, or where to place a bus stop, traffic light, pedestrian overpass or bus route, are the kinds of "core state functions" that local governments were created to perform. *EEOC*, 103 S. Ct. at 1060. Similarly, the budgeting of local transit agencies is an important part of a local government budget. *See, e.g., Subway-Surface Supervisors Association v. New York City Transit Authority*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389, 404 N.Y.S.2d 323, 329 (N.Y. 1978) (transit system is performing a governmental function because of the "intertwinement" between its finances and the city's). To serve people in a local community dependent on inexpensive transportation, general and special state and local tax revenues provide much of the financial support for local public mass transit.[19] Feinsod Affidavit ¶ 8, R. 178-80. Reduced fares

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[18] Federal appellant would dismiss the finding of the court below that publicly owned mass transit is a traditional governmental function by contending that some of the same reasoning could be applied to the Long Island Rail Road, a state-owned passenger railroad. U.S. Br. 20-21. For the reasons stated *infra* p. 27-30, such an approach would ignore the completely local nature of public mass transit, as distinguished from the Long Island Rail Road, which this Court found was an integral part of the interstate rail network and thus had been subject to comprehensive, uniform national regulation for nearly 100 years. *LIRR*, 455 U.S. at 687-90.

[19] Indeed, some states simultaneously combat transit costs and air pollution through funding transit with motor vehicle fuel taxes. *See, e.g.*, Cal. Const. art. 19, § 1; Tex. Rev. Civ. Stat. Ann. art. 1118x § 8 (Vernon Supp. 1982).

are provided for students and the elderly, *id.* ¶ 9B, R. 181-82,[20] and fares are kept low in the face of rising costs, making transportation accessible to the poor and the low and middle income workers, *id.* ¶ 9A, R. 180.

As the court below found, referring to *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979):

> Public transit benefits the community as a whole, . . . is provided at a heavily subsidized price[,] . . . [and] cannot be provided at a profit[, and therefore is provided] for public service, not for pecuniary gain. [Thus] government is particularly well suited . . . [and, in fact,] is the only component of society that can provide the service.
>
> Finally, government today is the primary provider of transit services.

U.S.J.S. 16a.

Appellants' attempt to characterize local publicly owned transit as a "business enterprise," which is the express premise for all the arguments made by Appellant Garcia, *see, e.g.*, G. Br. 6, is absolutely erroneous. State and local governments do not provide transit services in order to compete with the private sector in a profit-making activity.[21] Instead they have responded to the community-

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[20] *See also, e.g.*, Mass. Gen. Laws Ann. ch. 161A, § 5(e½)-5(e¾) (West 1976 & Supp. 1983).

[21] Federal appellant argues that states provide transit services as "market participants" rather than "as a traditional and essential element of state sovereignty." U.S. Br. 22-24 & note 23. This dichotomy is falsely applied for two primary reasons. First, *National League of Cities* does not require that the state service, *e.g.*, transit or sanitation, be an essential element of state sovereignty, but rather that the state decision to be preempted, *e.g.*, setting wages and hours, be such. *See supra* p. 13. Second, while *White v. Mass. Council of Constr. Employers*, 103 S. Ct. 1042 (1983), found that a limitation on state activity imposed by the Commerce Clause—that states may not unduly burden interstate commerce—is not applica-

wide need for this service regardless of its commercial viability. In *Jackson Transit Authority*, 457 U.S. at 17, *quoted in* U.S. Br. 26-27, this Court acknowledged the congressional finding that communities should "continue to receive the benefits of mass transportation despite the collapse of the private operations," thereby recognizing that public transit services are not revenue-raising ventures but are provided for public benefit. APTA is unaware of any publicly owned local transit system that does not have to draw on its local tax base to meet its costs. Feinsod Affidavit ¶¶ 6-8, R. 178-79.

Fares which provide only about 40 percent of transit operating revenues[22] do not offer much prospect for the survival of public transit in the competitive environment federal appellant desires. *See* U.S. Br. 13-14, 47-48. Nor do such user fees distinguish local public transit from other functions of government expressly protected in *National League of Cities*.[23] User fees often recover some of the operating costs of sanitation systems, public hospitals,

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ble when states act as market participants, this should not affect the States' Tenth Amendment immunity. Indeed, state and local governments did not enter into provision of transit services as market participants; they are not competing for profitable business with the private sector, but instead have assumed an important public function the private marketplace cannot provide.

[22] *Transit Fact Book* 45. The remaining operating revenues are derived principally from state and local assistance, which constitutes 40 percent of such revenues, as contrasted with federal operating assistance which constitutes only 17.3 percent. *Id.* It is beyond doubt that states do not provide transit services to "engag[e] in business activities which have as their aim the production of revenues in excess of costs." *See Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 418 n.1 (1978) (Burger, C.J., concurring).

[23] *See also* Urban Mass Transportation Administration, U.S. Department of Transportation, *Financing Transit: Alternatives for Local Government* 228 (1979).

parks and recreational facilities and even public schools.[24] Sometimes such charges finance a greater share of the costs of such traditional public services than do public transit fares.[25]

That the provision of public transit services is an integral governmental function is further demonstrated by the extensive disruption to community life that would result if state and local government were unable to structure routes and schedules as they believe best. "[P]articularized assessments of actual impact" of federal regulations, of course, are not necessary since it is the State's policy choices that are constitutionally protected. *National League of Cities*, 426 U.S. at 851. "The determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *FERC*, 456 U.S. at 770 n.33 (quoting *Hodel*, 452 U.S. at 292 n.33). The FLSA overtime requirements, however, do have a direct impact on the ability of state and local governments to choose how to structure routes, employee work hours, service schedules, record keeping and compensation.[26]

For example, the FLSA requires overtime payment of time-and-one-half the "regular rate" for hours worked over forty hours per week, which is computed in accord-

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[24] *See Mueller v. Allen*, 103 S. Ct. 3062 (1983) (some public schools also charge tuition or user fees).

[25] For example, the Federal Water Pollution Control Act, 33 U.S.C. § 1284(a)(4)-(b)(1) (1976 & Supp. V 1981), requires states receiving sewage treatment plant and areawide waste treatment management grants to recover from industrial users the full cost of the federal grants attributable to treatment of their waste and from other users the full cost of maintenance and operation of treatment facilities.

[26] *See, e.g., Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 303 (1965) (testimony of C. Cochran).

ance with a federal statutory formula. 29 U.S.C. § 207(a) (1976); 29 C.F.R. § 548 (1983). Unlike the private sector, state and local governments cannot decide on strictly economic terms whether to minimize costs under this requirement by hiring more employees,[27] or by designing routes and work schedules to reduce the amount of overtime needed. Public transit systems must set scheduling and make arrangements for work hours that enable them to provide essential community services. Special payment provisions have evolved through the years to compensate public transit operators for unique working requirements, such as the scheduling of bus drivers in two split shifts at peak commuter hours. *See, e.g.*, K. Chomitz and C. Lave, *Forecasting the Financial Effects of Work Rule Changes*, 37 Transp. Q. 453 (1983). If the FLSA provisions are superimposed on the pay structures the States have designed to respond to these special scheduling and other operational needs, substantial additional costs will be incurred.[28] A city with a restricted budget, as most are, may have to curtail service to points at the end of routes to avoid excessive overtime costs. If service at those hours is curtailed, the low and middle income people dependent on public transportation may be limited in the locations they can accept employment or may be forced to spend much more time commuting. Street traffic congestion will likely increase, perhaps necessitating use of additional police to direct traffic. Additional traffic would result in increased air pollution, *see Transit Fact Book*

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[27] Indeed, Congress assumed that such cost minimization would be a natural result of the FLSA overtime provisions. *See, e.g.*, S. Rep. No. 1487, 89th Cong., 2d Sess. 22, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3002, 3024 ("the committee believes that new jobs will become available as the excessive hours worked by present employees are reduced.").

[28] Labor costs in the form of salaries and fringe benefits are of critical significance to the management of transit systems. In 1980, for example, they comprised more than 70 percent of all operating expenses. *Transit Fact Book* 49.

38, perhaps causing additional expenditures to reduce other sources of pollution. This Court was critical in *National League of Cities*, 426 U.S. at 847, of "[t]his type of forced relinquishment of important governmental activities."

Application of FLSA requirements thus would leave the States with "less money for other vital State programs," and would limit their ability to pursue their "social and economic policies beyond their immediate managerial goals." *See EEOC*, 103 S. Ct. at 1063. Of course, to minimize the cost impact of the federal requirements the States could change their scheduling practices, but this would "have the effect of coercing the States to structure work periods in some employment areas . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *National League of Cities*, 426 U.S. at 850. "Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system." *EEOC*, 103 S. Ct. at 1075 (Burger, C.J., dissenting).

B. The Provision Of Publicly Owned Local Mass Transit Services Is Not A New Concept In State And Local Government Responsibility.

Appellants contend that, because local mass transit has become a pervasively state and local governmental function in recent decades, it cannot be protected under *National League of Cities*. Federal appellant, for example, urges this Court to give "primacy . . . to historical evidence," U.S. Br. 25, and to base its decision on whether the States have regarded transit services as an integral part of their governmental activities "since the inception of the industry." *Id.* at 24. Any such "static historical view" was expressly rejected by this Court in *LIRR*, 455 U.S. at 686, when it clarified that it would "not merely

. . . look[] only to the past to determine what is 'traditional.'" *Id.* It stated:

> This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation.

Id. at 686-87. *Cf. First National City Bank v. Banco Para El Comercio Exterior*, 103 S. Ct. 2591, 2603 n.27 (1983).

The provision of a local transportation infrastructure has been an integral function of state and local governments since the earliest days of our Republic.[29] *See Molina-Estrada*, 680 F.2d at 845. With the industrial age and the growth of the nation's urban areas, local streets and roads became inadequate to meet this governmental obligation. Indeed, "[i]n 1905 congested traffic at rush hours was described as the number one problem of large cities in the United States." W. Owen, *The Metropolitan Transportation Problem* 6 (rev. ed. 1966). As the problems of urbanization (such as unemployment, traffic congestion and safety, air pollution and mobility for students and the elderly) increased, state and local governments turned to developing public transit technology to meet community-wide needs.

Several major cities entered into the provision of publicly owned transit services financed through state and local bond issues or taxes early in this century.[30] In fact,

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[29] Even before the ratification of the federal Constitution, in Massachusetts "townships [were] obliged by law to keep their roads in good repair." A. de Tocqueville, *Democracy in America* 77 n.29 (J.P. Mayer ed. 1969) (citing Laws of Massachusetts, Law of March 5, 1787, Vol. I, p. 305).

[30] *See, e.g.*, C. Thompson, *Public Ownership* 225-26, 240-41 (1925). As early as 1925, this author commented: "So we now have in America not only numerous smaller cities owning and successfully

before the enactment of UMTA providing federal financial assistance, more than half of the nation's 21 largest cities provided publicly owned transit services. *See infra* p. 36.

By 1978, about 90 percent of transit revenues, total transit miles, total transit vehicles owned and leased, and linked passenger trips were attributable to publicly owned mass transit systems. Feinsod Affidavit ¶ 4, R. 176-77; *Transit Fact Book* 43. Today almost all of the metropolitan areas in the country with a population over 200,000 are served by transit systems owned by state or local government agencies.[31]

Moreover, local governments in rural areas also have responded to the need for public mass transit. By 1981, 248 out of 339, or 73 percent, of transit systems in non-urbanized areas were publicly owned.[32] The pervasiveness of state and local ownership of public transit is compar-

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operating municipal street car lines, but three of our larger cities [are also doing so]." *Id.* at 222. San Francisco had started providing local public mass transit service in 1912, Seattle in 1919, Detroit in 1922 and New York City in 1932. Cleveland acquired its public transit system in 1942, and public transit systems serving Boston and Chicago were acquired in 1947. American Public Works Association, *History of Public Works in the United States, 1776-1976* 177 (1976). Los Angeles, San Antonio, and Sacramento were served by publicly owned systems by 1959, J. Moody, *Moody's Transportation Manual* a70 (1960), Oakland by 1960, Memphis by 1961, J. Moody, *Moody's Transportation Manual* a72 (1961), and Miami in 1962. J. Moody, *Moody's Transportation Manual* a78 (1962). Public transit systems serving Long Beach and St. Louis were acquired in 1963, followed by those serving Dallas and Pittsburgh in early 1964, J. Moody, *Moody's Transportation Manual* a60-a61 (1964).

[31] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 1-12 (1981).

[32] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (1981).

able to other traditional governmental functions expressly listed in *National League of Cities.*[33]

Large numbers of state and local governments thus assumed the responsibility for providing mass transit services and funding them from tax revenues after it became clear that essential community-wide transit services could not be operated in a manner that would meet public needs and demands unless operated by a state or local government.[34] States have undertaken this function because they regard the maintenance of urban transportation infrastructures accessible to all residents "as integral parts of their governmental activities," *National League of Cities*, 426 U.S. at 854 n.18, and as "governmental services which their citizens require," *id.* at 847. These services, moreover, are for the benefit of the local community, rather than as part of an integrated network that serves all parts of the country. Thus, local publicly owned mass transit is the type of public service that the States have determined over many years is necessary to meet their fundamental public welfare obligations in the fulfillment of their "role in the Union." *LIRR*, 455 U.S. at 687.[35]

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[33] The fact that private institutions also provide some local transit services (*i.e.*, carrying about 6 percent of the passengers, *Transit Fact Book* 27, 43) cannot be a determinative factor under *National League of Cities*, since private institutions provide services in other areas protected by that decision. In 1979, for example, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools. U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 214 at 132 (1981) (published annually) ("SAUS: 19xx"). Moreover, in 1974, private firms collected 50 percent of all residential waste and 90 percent of all commercial waste. H.R. Rep. No. 1461, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6323, 6325.

[34] *Transit Fact Book* 27; D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. and Labor Rel. Rev. 95, 99 (1971). *See also Jackson Transit Authority*, 457 U.S. at 17.

[35] The essential and sovereign character of public transit services has been expressly recognized by some state constitutions, *see, e.g.*,

II. Other Federal Laws Applicable To Local Mass Transit Raised By Appellants Are Irrelevant To The Constitutional Principle At Issue And Do Not Distinguish This Activity Of State And Local Government From Other Activities Protected By *National League of Cities*.

Appellants interject into their analysis of this case a number of federal laws other than the FLSA which are irrelevant to the constitutional principle involved here. This attempt to complicate the picture and obscure the controlling effect of *National League of Cities* fails to provide any constitutionally significant basis for distinguishing publicly owned local mass transit from those activities of state and local government this Court expressly exempted from the FLSA requirements. Nor do appellants' contentions establish any federal interest sufficient to override the States' judgment that their provision of local transit services is as integral to the functions of state and local government as are the enumerated activities.[36]

Ga. Const. art. 9, §§ 4(2), 5(2); Ill. Const. art. XIII, § 7, and legislatures, *see, e.g., Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth.*, 576 F.2d 573 (5th Cir. 1978); *Henderson v. Metropolitan Atlanta Rapid Transit Auth.*, 236 Ga. 849, 853, 225 S.E.2d 424, 427 (Ga. 1976); *Mass Transit Admin. v. Baltimore County Revenue Auth.*, 267 Md. 687, 690, 298 A.2d 413, 415 (Md. 1973); *Teamsters Local Union No. 676 v. Port Auth. Transit Corp.*, 108 N.J. Super. 502, 507, 261 A.2d 713, 716 (N.J. Super. Ct. Ch. Div. 1970); *County of Niagara v. Levitt*, 97 Misc.2d 421, 422, 411 N.Y.S.2d 810, 812 (N.Y. Sup. Ct. 1978); *Pennsylvania v. Erie Metropolitan Transit Auth.*, 444 Pa. 345, 350, 281 A.2d 882, 885 (Pa. 1971).

[36] Federal appellant also attempts to distinguish publicly owned mass transit from the other protected activities by reliance on an early tax case, *Helvering v. Powers*, 293 U.S. 214 (1934), which held that the Trustees of the Boston Elevated Railway Company were not immune from federal income taxation. The activity addressed in that case, however, was the temporary quasi-public operation of

A. Traditional Federal Statutory Regulation Would Not Be Eroded If The Fair Labor Standards Act Is Not Applicable To State And Local Public Transit Agencies.

Appellants strain to bring this case within the limitation on Tenth Amendment immunity addressed in *LIRR*. In upholding the application of the Railway Labor Act to the employees of the state-owned Long Island Rail Road, this Court followed and expressly affirmed its decision in *National League of Cities*. Following a line of prior Supreme Court decisions involving statutes other than the FLSA—*Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936)—this Court stated in *National League of Cities* that "the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . .,'" 426 U.S. at 854 n.18 (citation omitted), is not "in an area that the States have

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a privately owned transit system. *Cf. Fry v. United States*, 421 U.S. 542 (1975). As Justice Rehnquist stated in his dissent in *Fry*, *id.* at 555 n.1: "The Court in [the later decided] *Helvering v. Gerhardt*, 304 U.S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability." Moreover, reference to this 1934 case does not answer whether public transit has become a traditional function of government as the result of the widespread establishment of public transit services by state and local governments since then. As Justice Black noted in his concurring opinion in *Gerhardt*,

> [m]any governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

304 U.S. at 427; *see also Massachusetts v. United States*, 435 U.S. 444, 458-59 (1978) (Brennan, J., concurring); *Graves v. New York*, 306 U.S. 466 (1939).

regarded as integral parts of their governmental activities," *id.*[37]

This Court further determined in *LIRR* that a state would "erode federal authority in areas traditionally subject to federal statutory regulation," 455 U.S. at 687, if it could exempt its employees from federal Railway Labor Act protection by acquiring a small but integral part of the national railroad system that has long been subject to federal Commerce Clause legislation specifically directed at that integrated system. This statement was made, however, in the context of what was perhaps a unique function for a state to acquire, *i.e.*, railroads, which even when publicly owned still serve as part of the national railroad system[38] and *qua* railroads, public or private:

> have been subject to *comprehensive* federal regulation for nearly a *century*. The Interstate Commerce Act—the first *comprehensive* federal regulation of the industry—was passed in 1887. A year earlier we had held that *only* the Federal Government, not the states, could regulate the interstate rates of railroads. . . . The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888. . . . The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of long-

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[37] The Court noted in *LIRR* that only two of the seventeen commuter railroads were publicly owned. 455 U.S. at 686 n.12.

[38] Indeed, federal appellant represented to this Court in *LIRR* that "the *LIRR, despite the evolving character of its operations*, remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable* from conventional intraurban transit systems." Brief for United States as *Amicus Curiae* at 12, *LIRR*, 455 U.S. 678 (1982) (emphasis added). "As is reflected in the definitions and statutory provisions cited . . . *one important attribute of commuter railroads is their genesis as a part of the railroad industry, rather than as a form of intraurban transit.*" *Id.* at 26 n.19 (emphasis added); *see also id.* at 25-27, nn.19-20.

> standing state regulation of railroad collective bargaining or of other aspects of the railroad industry.

455 U.S. at 687-88 (footnotes omitted; emphasis added). "Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system." *Id.*[39] The Long Island Rail Road acceded to this federal regulatory authority for the first 13 years of its ownership by the state, *id.* at 690;

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[39] In *LIRR*, the Court stressed that "Congress [had] long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy." 455 U.S. at 688. Under these circumstances, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any other of the elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Id.* at 689.

Extrapolating from this Court's concern in *LIRR* for preserving the perhaps unique, comprehensive, uniform federal regulation of railroads, federal appellant suggests that "substantial deference" is due the congressional determination that there should be uniformity in the FLSA between public and private transit agencies in order to avoid "unfair competition." U.S. Br. 13-14, 46-48. But this congressional desire for uniformity is of a wholly different nature from that in *LIRR* and was as much a reason why Congress in 1974 sought to bring within the FLSA many other public activities, including activities expressly protected in *National League of Cities*. H.R. Rep. No. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. No. 1487, 89th Cong., 2d Sess. 8, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3002, 3009-10. It is highly misleading for federal appellant to imply that Congress amended the FLSA because of a unique concern with eliminating some perceived "unfair competition" between public and private transit; in fact, the congressional reports cited for this proposition, *id.*, address the amendment of the FLSA definition of "enterprises" which affected coverage of public schools, hospitals, institutions and transit systems. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(c), 80 Stat. 830, 831. Furthermore, contrary to federal appellant's statement, U.S. Br. 36 n.29, sewage treatment has been privately provided in some cities, C. Thompson, *Public Ownership* 290 (1925); *cf.* Advisory Comm'n on Intergovernmental Relations, *Intergovernmental Responsibilities for Water Supply and Sewage Disposal in Metropolitan Areas* 15-16 (1962), and thus the same concern for competition could have arisen in that field.

it was only in the midst of the cooling-off period during a strike that the state attempted a conversion of the Long Island Rail Road's corporate status, "apparently believing that the change would eliminate Railway Labor Act coverage," *id.* at 681.

Local mass transit, in contrast, has always been a local responsibility. There simply is not, and never has been, any comprehensive federal system of law regulating local mass transit, private or publicly owned. *See Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). State or local laws have dictated, for example, the rates charged users of local transit,[40] equipment standards for transit vehicles,[41] the licensing of drivers of those vehicles,[42] and traffic safety rules.[43]

It simply cannot be said that when state and local governments entered this area they "knew of and accepted" the application of the FLSA. *Cf. LIRR*, 455 U.S. at 690. The statutory history of the FLSA is instructive. First,

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[40] *See, e.g.*, Cal. Pub. Util. Code §§ 210, 216, 451 (West 1975 & Supp. 1983); N.Y. Transp. Law § 141 (McKinney 1975 & Supp. 1983); Wash. Rev. Code Ann. §§ 81.64.010, 81.64.080 (1962).

[41] *See, e.g.*, Cal. Pub. Util. Code § 7810 (West 1965); Cal. Veh. Code §§ 26711, 35106, 35250, 35400, 35550-35551.5 (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 1-107, 15-102 (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law §§ 104, 375, 385 (McKinney 1970 & Supp. 1983); Wash. Rev. Code Ann. §§ 46.04.320, 46.37.005-46.37.500 (1970 & Supp. 1983).

[42] *See, e.g.*, Cal. Veh. Code § 12804 (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 1-146, 6-104 (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law § 509a-509h (McKinney Supp. 1983); Wash. Rev. Code Ann. § 46.20.440 (1970 & Supp. 1983).

[43] *See, e.g.*, Cal. Veh. Code §§ 21000 *et seq.* (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 11-100 *et seq.* (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law §§ 1100 *et seq.* (McKinney 1970 & Supp. 1983); Wash. Rev. Code Ann. §§ 46.61.005 *et seq.* (1970 & Supp. 1983).

it is a general statute applicable to virtually every private business engaged in interstate commerce; it is not a statute setting up a regulatory system with respect to a specific industry. Second, although applicable to many other private employers since first enacted in 1938, Congress did not even attempt to apply the FLSA to regulate the wages and hours of even private transit employees until 1961.[44] Its first limited attempt to extend these requirements to *public* transit employees (along with employees of public hospitals and schools) was in 1966, and even then Congress specifically excluded most private and public transit employees (*e.g.*, bus drivers and other operators) from the overtime requirements. Even after *Wirtz*, when Congress attempted to extend the FLSA requirements to most public agencies, overtime coverage of public and private transit operating employees was to be phased in; it was not until 1976, only seven years ago, that Congress intended to extend the full reach of federal wage and hour regulation to most local public transit employees,[45] and only four years ago (just two months before this action was filed) that the Executive Branch sought to implement this congressional directive.[46] State and local governments began to provide transit services prior to the enactment of the FLSA and well before Congress' attempt to extend it to private or public transit. About the time Congress attempted to apply the provisions of the FLSA to any transit system—public or private—the majority of major urban areas was served by publicly owned transit systems,[47] and the majority of

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[44] Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72.

[45] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

[46] *See supra* text accompanying note 7.

[47] *See infra* p. 36.

transit employees worked for publicly owned systems.[48] Furthermore, when Congress or the Department of Labor did act, those actions were immediately challenged in the courts.[49]

Federal appellant concedes that "the specific federal legislation at issue here is of comparatively recent vintage," and "Congress did not fully exercise its [alleged] powers to legislate respecting terms of employment in the transit industry until relatively recently." U.S. Br. 41-42. Thus federal appellant demonstrates that the States' provision of local transit services did not "erode federal authority in areas traditionally subject to federal statutory regulations," *LIRR*, 455 U.S. at 687. Rather, the federal government here seeks to extend its power into an activity the States were already conducting and into an area of historic regulation by the "States as employers." *See Hodel*, 452 U.S. at 286 (quoting *National League of Cities*, 426 U.S. at 841).[50] "[T]he Federal

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[48] By late 1964, 56 percent of transit employees worked for public authorities. *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 297 (1965) (testimony of C. Cochran).

[49] Federal appellant would have this Court ignore the fact that the Court's view of the Tenth Amendment has changed since 1966 when *Wirtz* was decided. *See* U.S. Br. 49-50 and n.38. It is not clear what federal appellant means by warning against a "doctrine of creeping unconstitutionality," *id.* at 50. No sinister scenario is suggested by the answer to federal appellants' question: "[o]n what date did the public transit provisions of the FLSA, assuredly valid when enacted, become unconstitutional?" *Id.* That date was June 24, 1976 when *National League of Cities* overruled *Wirtz*.

[50] The court below recognized that:

> the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(3), 52 Stat. 1067 (1938); Pub. L. No. 87-30, §§ 2(c),

Government cannot usurp traditional state functions [just as] there is no justification for a rule which would allow the states . . . to erode federal authority in areas traditionally subject to federal statutory regulation." *LIRR*, 455 U.S. at 687.

The fact that some activities protected by *National League of Cities* were at one time conducted more significantly in the private sector than in the public sector was not relevant to that decision. Perhaps this was because, unlike the acquisition of an interstate railroad, there was no reason to believe that a tradition of federal statutory regulation would be eroded by state acquisition of such activities. For, like local mass transit, and unlike railroads where there is "no comparable history of long-standing state regulation," *LIRR*, 455 U.S. at 688, the protected activities in *National League of Cities* were subject to extensive state regulation.[51] These are functions within the traditional sphere of state responsibility, and nothing in *LIRR* suggests that state acquisition of a private hospital, university or local mass transit system would so erode federal regulatory authority as to deny the States the immunity established by *National League of Cities*. Indeed, publicly owned hospitals, recreational facilities, schools and universities, museums

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9, 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. *Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.*

U.S.J.S. 7a-9a (emphasis added).

[51] Hospital regulation includes state licensing of hospitals and medical personnel. *See* American Hospital Association, *AHA Guide* C18-C19 (1983). Similarly, education, police and fire protection are heavily state-regulated. *See, e.g.*, Education Commission of the States, *Working Paper No. 2, Survey of States' Teacher Policies*, Tables I-IV (Oct. 1983) (teacher certification); Education Commission of the States, *A 50-State Survey of Initiatives in Science, Mathematics and Computer Education* 29-41 (1983) (curriculum guidelines and graduation requirements).

and sanitation services that have been acquired from the private sector are no longer subject to FLSA requirements.

In an attempt to fabricate an unconstitutional erosion of comprehensive federal regulation, appellants cite other general federal labor laws which apply to private local transit. U.S. Br. 39-40; G. Br. 19-20. But the statutes cited do not establish a *comprehensive* scheme of federal regulation unique to transit labor relations, as, for example, the Railway Labor Act does for railroads. Instead, the cited statutes regulate particular employment conditions for virtually all private employers in interstate commerce, including the private counterparts of the activities expressly protected in *National League of Cities*. In contrast, public employers, including publicly owned transit systems, are generally exempt from such federal labor laws and instead are subject to state collective bargaining laws that govern wages and hours for their employees. U.S. Department of Labor, *Summary of Public Sector Labor Relations Policies* (1981).[52]

Thus, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981), regulates the private conduct of all the activities listed in *National League of Cities*, *e.g.*, private hospitals and schools, as well as pri-

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[52] Federal appellant also cites some federal statutes that apply to traditional governmental functions, such as the Equal Pay Act, 29 U.S.C. § 206 (1976 & Supp. V 1981), which was upheld against Tenth Amendment challenge in *Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979). Like *EEOC*, in which the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), was upheld against Tenth Amendment challenge by a state park game warden, *Pearce* involved an employment category, public hospital employees, which with respect to the FLSA was expressly immunized by *National League of Cities*. Thus, the fact that some federal labor laws may even apply to traditional governmental functions does not make the particular governmental functions any less traditional for the purposes of the FLSA wage and overtime compensation requirements—which *National League of Cities* held cannot be imposed on the States.

vate transit, but it specifically exempts state and local government employees, including public transit employees. 29 U.S.C. § 152(2) (1976). *See also Jackson Transit Authority*, 457 U.S. at 23. For this reason the district court concluded, "any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent." U.S.J.S. 7a-9a. Furthermore, the statutes cited, except perhaps the NLRA, were enacted after the state and local governments of many of the nation's major metropolitan areas were providing local public transit services. *See supra* note 30. Unlike the railroad regulation in question in *LIRR* and the national emergency wage freeze legislation at issue in *Fry*, regulation of the labor relations of local mass transit, publicly or privately owned, has not presented a problem that Congress believed "only collective action by the National Government might forestall." *National League of Cities*, 426 U.S. at 853.

B. By Accepting Federal Financial Assistance, The States Should Not Be Held To Have Tacitly Unleashed Boundless Federal Commerce Clause Authority.

Unless this Court adopts a "static historic view," [53] appellants have not presented any convincing reasons why publicly owned local transit services are constitutionally distinguishable from activities expressly protected in *National League of Cities*. Appellants thus search for another constitutionally significant basis upon which to justify federal usurpation of the States' authority to fix the hours and wages of their public transit employees. They seize upon the federal funding to the States under UMTA to shore up their weak argument that the FLSA may

[53] This view, of course, was rejected in *LIRR*, 455 U.S. at 686.

be applied to publicly owned local transit. The significance of UMTA funding is elusive, however.

1. This Court was well aware that the activities protected in *National League of Cities* received substantial federal financial support, *see* 426 U.S. at 878 (Brennan, J., dissenting); yet the Court nevertheless held that the FLSA could not be applied to them. UMTA funding is no more significant than the federal funding of other traditional activities simply because, if appellants' allegations are correct, it provided an incentive for public ownership.

Contrary to appellants' contention, U.S. Br. 12, 17, 26, 28; G. Br. 20-21, the trend toward public ownership of local mass transit was well established before the enactment of UMTA. Prior to the availability of UMTA funds, the majority of the largest urban centers had publicly owned transit systems. Of the nation's twenty-one largest cities (*i.e.*, with populations in excess of 500,000), twelve were served by publicly owned transit systems by 1964. *Compare supra* note 30 *with SAUS: 1965*, Table 14 at 19-20. There is no doubt that federal aid helped many cities, particularly smaller cities, to fulfill their responsibility to provide transit services when private systems were unable to satisfy the public welfare obligations that urban transit had assumed.[54] But state and local governments have obligated substantial portions of their limited resources to perform this service because it is an integral part of their traditional function of facilitating intra-urban transportation.[55] It is simply historical revi-

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[54] "Today nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century—traffic engineering, airports, parking facilities, health clinics, and a long list of others." W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966).

[55] As noted *supra* note 22, state and local operating assistance contributes a substantially greater share of public transit revenues than does federal operating assistance. *Transit Fact Book* 45. State

sionism to imply that state and local governments provide transit services because federal aid enticed them into doing so. Indeed, Congress made clear that UMTA was not intended to encourage the acquisition of private transit systems by public agencies. *See, e.g.*, 49 U.S.C. § 1602(e) (1976 & Supp. V 1981); S. Rep. No. 82, 88th Cong., 1st Sess. 19 (1963); H.R. Rep. No. 204, 88th Cong., 1st Sess. 12, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2581; 110 Cong. Rec. 14,905 (1964) (statement of floor leader Rains). Rather, Congress responded to pleas from state and local government officials for financial assistance that would help the States preserve a function they believed critical to the local public welfare,[56] and therefore a "core state function." *EEOC*,

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and local governments have also provided substantial capital funds. *See id.* at 29. Federal appellant's argument regarding federal funding of transit is grossly misleading. *See, e.g.*, U.S. Br. 34-36. He states that "the federal government . . . has supplied a larger share of [transit] operating subsidies than state government in many recent years," *id.* at 34, but this ignores the facts stated in appellant's own source that during those years local governments have provided a substantially greater share of operating assistance than has the federal government and that state and local government assistance combined has been in the range of 70-80 percent of all government operating assistance. *Transit Fact Book* 28-29. Another incomplete quotation in federal appellant's brief, U.S. Br. 31, implies that APTA has conceded the importance of federal funds to widespread state and local government takeover of transit services. He fails to include the first part of the sentence, which states: "*The relatively small amount of funding* during the 1960s was used by many cities to buy the vehicles and facilities owned by private transit systems that were on the verge of bankruptcy." *Transit Fact Book* 29 (emphasis added).

[56] *See* U.S. Br. 12; *see also Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 88 (1963) (statement of J.F. Collins, Mayor of Boston); *id.* at 91 (statement of E. Peabody, Governor of Massachusetts); *id.* at 312 (statement of P.H. Sachs, Chairman of Maryland Metropolitan Transit Authority); *id.* at 414-15 (statement of W.D. McClelland, Chairman of the Board of County Commissioners of Allegheny County); *Urban Mass Transporta-*

103 S. Ct. at 1060. Federal grant aid to cities in support of transit services—like federal aid to education, hospitals and law enforcement—simply demonstrates that Congress thought it important that states be able to meet their local public welfare responsibilities in these areas.[57]

No doubt changing circumstances such as the increased use of automobiles and the migration to the suburbs, which were due in large part to substantial federal highway funding,[58] contributed greatly to the collapse of pri-

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tion—1963: Hearings on S. 6 and S. 917 Before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. 188-89 (1963) (statement of G.S. Clinton, Mayor of Seattle).

[57] Federal funding has not made state provision of sanitation, health or educational services any less a traditional governmental function. Many such state and local programs would not have existed without federal funding. For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceded Federal legislation in this field." S. Rep. No. 1367, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, comprehensive, statewide health planning was "spotty and fragmented" prior to federal funding of such planning, *see* H.R. Rep. No. 2271, 89th Cong., 2d Sess. 4, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3830, 3833. *See also* National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, §§ 1512, 1513, 88 Stat. 2225, 2232-39 (specifies structure and functions of local health systems agencies, which may themselves be local governmental units); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 ("State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children;" the federal role is to be "a catalyst to local and State program growth," S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429).

[58] *See* S. Rep. No. 82, 38th Cong., 1st Sess. 4 (1963).

vate urban transit systems.[59] UMTA represents in part a congressional attempt to redress the imbalance between federal highway funding and support for mass transit so that the States could fashion the "completely balanced transportation system," *see* U.S. Br. 29, that they believe would best meet the needs of local residents and the community at large.[60]

2. Appellants' argument must therefore rest on the onerous notion that by accepting federal funds to assume a function necessary to the life of the community, state and local governments—without express notice in the statute or in a condition of the grant—unleashed boundless federal Commerce Clause authority over an integral activity otherwise entitled to Tenth Amendment protection.

This argument is so wholly inconsistent with this Court's precedents that it must be scrutinized closely. *See, e.g., Pennhurst*, 451 U.S. at 17; *Harris v. McRae*, 448 U.S. 297 (1980); *Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279 (1973).

Like the program of aid for the developmentally disabled at issue in *Pennhurst*, UMTA "is a federal-state grant program whereby the Federal Government provides financial assistance to participating States" for the provision of public mass transit services. 451 U.S. at 11. It is not any different fundamentally from federal grant programs that assist schools, hospitals, police and fire departments and sanitation.[61] "Like other federal-state coopera-

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[59] H.R. Rep. No. 204, 88th Cong., 1st Sess. 4, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2571-72.

[60] S. Rep. No. 82, 88th Cong., 1st Sess. 4 (1963); H.R. Rep. No. 204, 88th Cong., 1st Sess. 4, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2571-72; 110 Cong. Rec. 14,907 (1964) (statement of floor leader Rains).

[61] Federal funding of other traditional governmental functions has far exceeded that of local public mass transit. The federal ap-

tive programs, the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding."

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pellant states that "[b]y 1978 more than $13 billion in [federal] aid [to transit] had been awarded under the UMT Act and other federal programs. . . . Federal capital grants exceeded $2 billion annually in fiscal 1978 and 1979." U.S. Br. 27-28. In comparison, however, between 1965 and 1978 (excluding 1967, for which data are not available), more than $57.8 billion in federal aid was given to public elementary and secondary schools. (For years 1966, 1970, and 1975-78, *see SAUS: 1981*, Table 218 at 135; for years 1965, 1968 and 1969, *see SAUS: 1970*, Table 149 at 105; for years 1971 and 1972, *see SAUS: 1972*, Table 157 at 106; for 1973, *see SAUS: 1976*, Table 186 at 117; and for 1974, *see SAUS: 1980*, Table 222 at 141.) For the two-year period, 1977-78, the federal government provided $7.7 billion in aid to public elementary and secondary schools. W. Grant & L. Eiden, *Digest of Education Statistics*, Table 66 at 75 (1982).

Similarly, a comparison of federal funding of sanitation and public transit shows that during the ten-year period, 1971-81, the federal government had awarded states $27.11 billion in sewage treatment construction grants. (U.S. Department of the Treasury, *Federal Aid to States* (published annually) (*"FAS: 19xx"*). *FAS: 1971* at 4; *FAS: 1972* at 4; *FAS: 1973* at 6; *FAS: 1974* at 5; *FAS: 1975* at 6; *FAS: 1976* at 8, 27; *FAS: 1977* at 6; *FAS: 1978* at 6; *FAS: 1979* at 7; *FAS: 1980* at 10; and *FAS: 1981* at 9.) In 1979 alone, the federal government provided $3.7 billion in subsidies for sewage and sanitation services, *FAS: 1979* at 7, which accounted for 31.4 percent of total local expenditures of $11.77 billion on such services. U.S. Department of Commerce, *Environmental Quality Control, Governmental Finance: Fiscal Year 1978-1979*, Table C at 4 (1981). This compares with only $2.96 billion in 1979 for local public mass transit operating subsidies and capital grants, or 36.6 percent of available revenues, *Transit Fact Book*, Table 5 at 46 and Table 19 at 67.

With such substantial federal financial assistance now necessary to support the capability of state and local governments to perform essential public services such as education, sanitation, and public local mass transit, it would indeed be an odd constitutional doctrine that drew the line at some arbitrary percentage of federal assistance and rested a fundamental principle of constitutional law on the shifting sands of the federal budget process.

Id. The question in this case is not whether Congress has the power pursuant to the Spending Clause[62] to condition federal assistance to public transit systems on compliance with the FLSA, because Congress did not impose this condition. In accepting federal assistance to acquire, operate or expand this necessary public service, the States were accepting only the federal authority expressed in the statute or the grant, *Pennhurst*, 451 U.S. at 16-17. UMTA does not condition grants on consent to other federal labor regulations, including the FLSA. Moreover, unlike the Railway Labor Act directly at issue in *LIRR*, UMTA was not enacted pursuant to the Commerce Clause and does not purport to be part of a comprehensive system of federal regulation of local transit, *Local Division 589*, 666 F.2d at 633-34. Nor does any such system exist. Congress did address labor relations in UMTA, but instead of imposing specific federal conditions such as the FLSA requirements, it deliberately chose a less intrusive approach, providing in section 13(c) that state and local governments should make "arrangements" to preserve existing collective bargaining rights as a condition of federal funding. 49 U.S.C. § 1609(c) (1976). In *Jackson Transit Authority*, 457 U.S. at 27, this Court unanimously held that Congress "did not intend [UMTA] to create a body of federal law applicable to labor relations between local governmental entities and transit workers." Congress respected the States' need for flexibility to manage their labor relations with local transit employees consistently with their public service obligations.[63]

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[62] The relationship between the Spending Clause and the Tenth Amendment was expressly not addressed in *National League of Cities*, 426 U.S. at 852 n.17. *See also Pennhurst*, 451 U.S. at 17 n.13.

[63] In *Jackson Transit Authority*, 457 U.S. at 27, this Court held that section 13(c), which addresses state and local transit employees' collective bargaining rights in, for example, wages and hours,

UMTA's section 13(c) allows the States to select among alternative means to preserve rights of employees of private transit systems. The FLSA, in contrast with section 13(c), is so specific in its wage and hour provisions that it would be impossible for the States to preserve necessary options and at the same time fulfill federal requirements.[64]

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does not establish any *federal* rights for employees of transit systems receiving UMTA funds in addition to those rights established by *state* law. This Court stated:

> Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.

Id. at 27 (footnote omitted).

Jackson Transit Authority sharply distinguished the effect of section 13(c) of UMTA on the federal rights of transit workers from the effects of a federal labor statute on the federal rights of railroad employees. *Id.* at 27 n.9. The Court thus found that the law applicable to local public transit workers was *not* similar to its decision in *Norfolk & Western Railroad Co. v. Nemitz*, 404 U.S. 37 (1971), that "a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2)(f) of the Interstate Commerce Act," *Jackson Transit Authority*, 457 U.S. at 27 n.9; with respect to transit, the Court determined that section 13(c) of UMTA "addresses 'municipal and State problems, and not Federal problems.'" *Id.* at 28 n.11.

[64] Thus, as this Court concluded in *EEOC*, the FLSA and the ADEA at issue in that case have a very different effect on the States' policy choices. Unlike the FLSA, the ADEA

> does not require the State to abandon [its] goals, or to abandon the public policy decisions underlying them.
>
> Perhaps more important, . . . in distinct contrast to the situation in *National League of Cities*, even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

103 S. Ct. at 1062 (citations omitted).

This Court has made clear that:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'. . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S. at 17 (citations omitted). *Pennhurst* and *Jackson Transit Authority*, together, establish that in enacting UMTA Congress has not attempted to require state compliance with the FLSA through the exercise of its Spending Clause power.

It would indeed be a strange conclusion, therefore, that Congress, by providing UMTA funds through the exercise of its Spending Power, has implicitly eliminated the Tenth Amendment limitation on its Commerce Clause powers. Again, as this Court stated in *Pennhurst*, 451 U.S. at 16-17: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under [some other constitutional] authority [in addition to the Spending Clause when Congress has not] expressly articulate[d] its intent to legislate. . . . The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." Nevertheless, appel-

lants in effect urge this Court to decide that in the enactment of UMTA Congress intended to legislate pursuant to the Commerce Clause, as well as the Spending Power, and to imply a condition on the receipt of federal funds which, as an exercise of Commerce Clause power unrestrained by the Tenth Amendment, would alter permanently the balance of federal-state relations even though the States did not realize the existence of such an implied condition at the time they accepted the federal funds.[65]

3. Appellants also contend that UMTA funding has established a federal interest that outweighs the interests of the States. But, as already noted, *supra* pp. 36-39, the federal funding here, like most federal funding of other traditional functions, is simply helping the States perform a function that they may have chosen to provide. Since the revenue raising ability of states is much more limited than that of the federal government, it is not surprising that states have sought federal financial assistance for public transit as they have done in virtually every other area of traditional state governmental functions.

Federal appellant argues, furthermore, that local public mass transit systems are not "integral to the functioning of state and local governments [because] the very shape of transit systems as they exist today reflects the imprint of *federal* policy" encouraging "comprehensive area wide plan[ning]." U.S. Br. 32-33. If local governments of cities and their suburbs "were induced [by the federal government] . . . to band together and to create metropolitan transit systems spanning the entire urban area," *id.* at 32, this type of federal incentive is indistinguishable from similar federal planning incentives

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[65] Appellants' argument is particularly threatening because it constitutes a realignment that the States cannot cure since the rationale is based on initial, not continuing, acceptance of federal money. *Cf. Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3229 (1983) (States may prefer to terminate receipt of federal money rather than comply with a condition if they disagree with its interpretation).

that have induced regional coordination among local governmental units in providing many of the public services expressly protected in *National League of Cities.*[66]

State and local governments must have a strong interest in providing a service before they will assume the function, regardless of whether federal funds are available. It drains their limited resources in ways not compensated for by federal funds, as they must match a share of federal funds and generate revenue through the local tax base. It would be a confusion of the respective functions of the different levels of government to conclude that simply because the federal government raises revenues and concurs in the States' judgment that grants should be given to provide a basic community service, that the federal government can impose the full force of federal private sector regulations on state agencies. Through uniform national taxation, the federal government has resources the States cannot approach. If federal revenue is shared with the States to enable them to provide a service they deem integral to community life, the result should not be that at some undetermined time in the future the States, without warning, will find they have surrendered substantial portions of their sovereignty.

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[66] *See, e.g.*, National Health Planning and Resources Development Act, 42 U.S.C. § 300m-4 (1976 & Supp. V 1981) (grants for planning by state health systems agencies and state health planning development agencies); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6942-6949 (1976) (federal grants and guidelines for comprehensive planning for solid waste disposal); Federal Water Pollution Control Act, 33 U.S.C. §§ 1255, 1256, 1281-1291 (1976 & Supp. V 1981) (grants to state agencies for comprehensive water quality control plans and encouragement of areawide waste treatment plans).

III. Alternatively, Application Of The Fair Labor Standards Act To Publicly Owned Local Mass Transit After *National League of Cities* Is Impermissible In The Absence Of A Subsequent Amendment To That Act.

Before *National League of Cities* overruled *Wirtz*, Congress extended FLSA requirements to all state and local government agencies, including public transit agencies. *National League of Cities* struck down as unconstitutional most of the intended coverage.

Despite the presence of a standard severability clause in the FLSA, 29 U.S.C. § 219 (1976), it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could no longer carry out its intent to cover all state and local employees.[67] *See Sloan v. Lemon*, 413 U.S. at 834. This statutory scheme is quite unlike that considered in *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2775 (1983). Several categories of public employees covered by the FLSA were brought within its ambit in 1966; at that time most public transit employees were excluded from the overtime compensation provisions. When the law was broadened in 1974, and the coverage of the large number of transit employees was phased in, Congress was acting on the strength of *Wirtz* and its belief that it could comprehensively regulate wages and hours for all state public employees. The presumption articulated in *Chadha* should not be applied to federal regulation of state activity because congressional regulation of the States has always required express statement of congressional intent. *Cf. Pennhurst*, 451 U.S. 1 (1981).

Moreover, what remains after severance is not "fully operative" and "workable administrative machinery."

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[67] *National League of Cities* expressly eviscerated coverage for what is currently 73 percent of state and local government employees. *SAUS: 1983*, Table 501 at 303.

Chadha, 103 S. Ct. at 2775. Such federal intervention in wage and hour decisions for a small number of state employees and not for others is divisive and may undermine the States' leverage in labor negotiations with its employees not subject to federal law.

Therefore, the minimum wage and overtime compensation provisions of the FLSA should not be applied to publicly owned local mass transit, even if public transit were not an integral operation in an area of traditional governmental function, because these requirements are not severable from the unconstitutional provisions of the statute. This Court may rely on this alternative argument to affirm even though it was not the ground relied on by the lower court. *See Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975).

CONCLUSION

The district court correctly concluded that, like protected activities expressly mentioned in *National League of Cities*, publicly owned local transit services are "important governmental activities," 426 U.S. at 847, which are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851 (footnote omitted). Indeed, these are precisely the kinds of public welfare services that "States have traditionally afforded their citizens." *Id.*

Since this Court has held, and repeatedly confirmed, that the precise federal regulation at issue here impermissibly interferes with an essential attribute of state sovereignty—the power to fix wages and overtime compensation—and that when applied to integral operations in areas of traditional governmental functions it "endangers [the States'] 'separate and independent' existence," *LIRR*, 455 U.S. at 690 (quoting *National League of Cities*, 426 U.S. at 851), it follows that publicly

owned local mass transit, as an integral and traditional governmental function, may not be subject to the FLSA.

Accordingly, this Court should affirm the court below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

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QUESTIONS PRESENTED

1. Whether *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976 & Supp. V 1981) ("FLSA") to the operations of San Antonio Metropolitan Transit Authority because it is performing an integral operation in an area of traditional governmental functions?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1951 and 82-1913

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

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BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the laws reproduced in the Government's brief, certain provisions from Texas Revised Civil Statutes Annotated, articles 1118x (Vernon Supp. 1982-83), 6663b and

6663c (Vernon 1977) are involved in this case. The more important provisions are set forth in an appendix to this brief, *infra*, 1a-8a, along with additional excerpts from the FLSA and the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) ("UMTA").

STATEMENT OF THE CASE

An Historical Overview Of The FLSA, As Applied To The States

As originally enacted in 1938, the FLSA set minimum wage and overtime pay requirements for employees engaged in commerce or the production of goods for commerce. Specifically excluded were states and their political subdivisions as well as employees of "street, suburban, or interurban electric railway[s], or local trolley or motorbus carrier[s]." Pub. L. No. 75-718, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067 (1938).

In 1961, the FLSA was amended to extend minimum wage coverage to employees of private electric railways and trolley and motorbus carriers having gross revenues of one million dollars or more; an exemption from the overtime requirements for all such employees was simultaneously enacted. Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). The exemption from both the minimum wage and overtime provisions was continued for all employees of such entities having gross revenues of less than one million dollars. *Id.* § 9. The total exemption of public employers remained unchanged.

In 1966, the FLSA was amended to cover states or their political subdivisions with respect to schools, hospitals and "street, suburban or interurban electric railway[s], or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency . . . ." Pub. L. No. 89-601, §§ 102(a) & 102(b), 80 Stat. 830, 831 (1966). The threshold level for coverage was reduced to $250,000, and the overtime exemption was continued for transit operators, drivers and conductors. *Id.* §§ 102(c), 206(c). In 1968, the amendment covering public schools and hospitals was held constitutional. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, the FLSA was amended to reach all state and local government employees and, in stages, to repeal the overtime exemption for drivers, operators and conductors effective May 1, 1976. Pub. L. No. 93-259, §§ 6(a)(1), 6(a)(6) & 21(b)(1), 88 Stat. 55, 58, 60, 68 (1974). The constitutionality of the amendments covering state and local government employees was challenged in a landmark case in which this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl 3." *National League*, 426 U.S. at 852. The Court did not identify all constitutionally protected state activities, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. The Court expressly overruled *Maryland* v. *Wirtz*, and thereby extended constitutional immunity to schools and hospitals, which it concluded also "provide[] an integral portion of those governmental services[1] which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855. The only activity identified as not being immune was a state-operated railroad. *Id.* at 854 n.18. Public transit was not mentioned.

On remand, the court recognized that this Court's decision did not provide an exhaustive list of exempt activities and left a gray area for future resolution. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). As a result, the Secretary of Labor issued regulations (29 C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator is to determine those operations against which he will seek to enforce the FLSA and to publish those determinations as amendments to section 775.3(b).

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[1] Garcia's brief (pp. 7, 8, 13, 23, 24) is largely premised on the faulty and self-serving hypothesis that government provision of a "service" should be treated differently from the activities exempted in *National League*. Garcia's strained logic disregards the fact that the very activities listed in *National League* were denominated services by this Court.

The Proceedings In This Case

By letter dated September 17, 1979 (R. 163), to the Amalgamated Transit Union, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System [SAMTA's municipally-owned predecessor] . . . are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in *National League*. . . ." On November 21, 1979, SAMTA filed this action for a declaratory judgment that the FLSA's minimum wage and overtime provisions are inapplicable to its operations. SAMTA's operators then brought a separate action for alleged unpaid overtime and liquidated damages, which was stayed pending disposition of the constitutional issue in this suit. The Secretary of Labor counterclaimed against SAMTA for backpay and injunctive relief, and the American Public Transit Association ("APTA") and Joe G. Garcia, one of SAMTA's employees, were permitted to intervene.

On November 17, 1981, the district court held that local publicly owned mass transit systems constitute integral operations in areas of traditional governmental functions under *National League* and entered summary judgment in favor of SAMTA and APTA. Gov't J.S. App. C. Upon direct appeal, this Court vacated the district court's decision and remanded for "further consideration" in light of its intervening decision in *United Transportation Union* v. *Long Island Rail Road*, 455 U.S. 678 (1982) ("LIRR"). *Donovan* v. *San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

On February 18, 1983, the district court reentered summary judgment in favor of SAMTA and APTA.[2] The court articulated the question before it as "whether public transit is one of 'the *numerous* line and support activities which are well within the area of traditional operations of state and local govern-

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[2] A copy of the district court's opinion has been reproduced as Appendix A to the Government's jurisdictional statement and is cited in this brief as "Gov't J.S."

ments.' " Gov't J.S. 3a (emphasis in original). The court found that "mass transit has traditionally been a state prerogative and responsibility, not a federal concern," and that "[u]nlike the railroad in *LIRR*, . . . neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity." Gov't J.S. 6a, 7a. The court also concluded that "[t]he states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the [*National League of Cities* v.] *Usery* functions," and that "Congress [has] recognized the similarities between public transit and the *Usery* functions." Gov't J.S. 12a, 13a. The court rejected the claim that partial federal funding of transit defeats *National League* immunity because the federal funding statute for transit "is an exercise of the Congressional Spending Power," "federal funding supports each of the *Usery* functions," and "the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity." Gov't J.S. 14a, 16a.

The district court also rejected the "[p]ervasiveness of government performance of a function" and a "function's origins in the private sector" as bases for distinguishing transit from the activities listed in *National League* and cited statistics showing that publicly owned hospitals would not be exempt under such a test. Gov't J.S. 16a, 17a. Finally, the court concluded that transit satisfied the four immunizing factors set out in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979): transit "benefits the community as a whole"; it "is provided at a heavily subsidized price"; transit "services cannot be provided at a profit"; and "government is today the primary provider of transit services." Gov't J.S. 18a, 19a.[3]

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[3] Since *LIRR* was decided, four federal appellate courts have considered this same question. However, contrary to the Government's claim (brief p. 10), all courts of appeals have not "unanimously recognized" the constitutionality of FLSA coverage of publicly owned transit systems. In *Molina-Estrada* v. *Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982),

Facts About Public Transit In San Antonio[4]

Publicly owned transit has existed in San Antonio since 1959, when the City acquired the San Antonio Transit Company and began providing transit as a municipal service through the newly created San Antonio Transit System ("SATS").[5] The City's purchase was financed by revenue

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the court held that a highway authority which, among other things, had the power to operate a mass transportation system (and intended to build one) was exempt under *National League* because its activities were "sufficient to indicate that the Authority is responsible for 'traditional' or 'integral' governmental activities." *Id.* at 845. The court could find "no meaningful distinction between the Authority's activities, and those, for example, of a municipal airport, . . . or the parks, recreation and public health activities mentioned in *National League of Cities* itself." 680 F.2d at 846. *National League* immunity was denied in *Alewine* v. *City Council of Augusta, Ga.*, 699 F.2d 1060 (11th Cir. 1983), *petitions for cert. pending* (Nos. 82-1974 & 83-257) and *Kramer* v. *New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983), and summary judgment on this issue was reversed in *Dove* v. *Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983). *Alewine* and *Kramer* were based on an historical approach, which was eschewed by this Court in *LIRR*, and on federal funding under UMTA, which contravenes this Court's decision in *Jackson Transit Auth.* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982), see discussion *infra* pp. 29-33, 41-45. *Dove* relied in large part on this Court's denial of certiorari in *Kramer* and federal funding of transit.

[4] Unless another citation is given, the facts are taken from the affidavit of Wayne Cook. R. 196-203.

[5] Garcia's brief (p. 3) gives the erroneous impression that the City may have created SATS to make money. As newspaper articles at the time indicate, this was not the case. According to one article, negotiations between the City and the transit company for a new franchise broke down over increased fares and "inadequate city control over future fare increases." As a result, the City called a bond election to purchase the system. The San Antonio Light December 23, 1958 at A1, col. 1 and A4, col. 1. An article in The Light on January 11, 1959, recites that "if voters veto the bond issue the city will be forced to grant a new franchise to the present company on the company's terms . . . [which] would almost certainly include continued increases in fares"; that the transit company intends "to double the fares of school children"; and that "the city . . . held that fares should be reduced rather than increased." The article mentions a newsletter from the research and planning council and states that public transit "is a declining industry due to soaring costs, declining patronage and vanishing profits," which can result

bonds, and no federal funds were involved in the acquisition. For forty-four years before 1959, the City regulated street transportation pursuant to authority from the state. See *infra*, pp. 24-26.

In 1973, the Texas Legislature enacted article 1118x, which authorizes the establishment of metropolitan rapid transit authorities and provides that they are "exercising public and essential governmental functions. . . ." *Id.* § 6(a).[6] SAMTA was created under article 1118x by the City Council of San Antonio in 1977. After an election was held confirming SAMTA's creation and authorizing it to levy a one-half percent sales tax, SAMTA purchased the facilities and equipment of SATS from the City and commenced operations on March 1, 1978. SAMTA funded the purchase through bonds secured by its revenues and certain property. No federal funds were used in the purchase.

During its first two fiscal years, SAMTA's regularly scheduled line-service buses carried approximately 63.4 million passengers over more than 26.5 million bus miles. Of these passengers, approximately 5.3 million were senior citizens, 1.5 million were handicapped persons and 14.6 million were elementa-

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in "deficits and subsidies . . . [that] have to be provided for out of taxes." The article closes by stating that "City officials are well aware of these complications. But they simply see no alternative to municipal ownership unless public transportation is to be discontinued. Because this is an issue of broad public policy they have referred the question to the voters." *Id.* at A1, col. 1 & A4, col. 1.

[6] Under article 1118x, an authority can, among other things, exercise the right of eminent domain; establish and maintain fares subject to approval by a local government approval committee; make all rules and regulations governing the use, operation and maintenance of the system; issue bonds and notes; levy and collect motor vehicle emission taxes; levy, collect and impose a local sales and use tax subject to a local election; levy and collect any kind of tax other than an ad valorem tax on property which is not prohibited by the Texas constitution; and prescribe the compensation of its employees. *Id.* §§ 6, 6E, 7, 8, 11A, 11B, 12(a). An authority *must* provide service to incorporated cities and unincorporated areas adjacent to its service area if the electorate of such a city or area vote for annexation into the authority. *Id.* § 6A.

ry, junior high, high school and college students, and children under 12. Approximately 3.3 million other student passengers were transported to and from school by SAMTA on nonline school bus service pursuant to arrangements with two Bexar County school districts. It is estimated that at least two-thirds of all passengers riding SAMTA's regular line-service buses are travelling to or from school or their jobs. SAMTA also serves the needs of the elderly and handicapped through a fleet of lift-equipped vans, which cost riders 50¢ and SAMTA over $8.50 per trip.[7]

SAMTA operates almost entirely from local sales taxes, federal funds and fare box receipts. Fares charged to passengers are nominal, ranging from no charge for the smaller El Centro buses that circulate through the downtown area, up to 60¢ per ride for the longest runs, with children, the elderly and the handicapped paying 10¢. The average fare is 18¢. For SAMTA's first two fiscal years, total revenues from line-service fares were about $10.1 million, compared to operating expenses for such services of about $41.6 million. SAMTA had an operational deficit of about $31.5 million, which was satisfied from sales taxes totalling approximately $26.8 million, operational grants of approximately $12.5 million from the Urban Mass Transportation Administration, and other operational revenues of approximately $.7 million.

Summary Of Argument

I. In *National League* this Court held that the States' power to determine wages and hours is an attribute of state sovereignty and that the FLSA unconstitutionally threatens the States' separate and independent existence when it is applied to "integral operations in areas of traditional governmental functions." 426 U.S. at 852. The narrow question presented in this case, therefore, is whether publicly owned mass transit is an activity that is properly includable in the "catalogue of the numerous line and support activities" which

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[7] Facts regarding fares are from the record and therefore reflect circumstances at the time of briefing in the court below.

the Court has insulated from FLSA coverage. *Id.* at 851 n.16. Transit clearly is one of these activities.

A. In *LIRR*, the Court relied upon certain characteristics of railroads which made the Long Island Railroad a nontraditional state activity. Transit does not share these characteristics.

1. Unlike railroads, for which the "Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system," *LIRR*, 455 U.S. at 688, transit provides a purely local service and is not part of a national transportation system requiring uniformity.

2. Unlike railroads, which "have been subject to comprehensive federal regulation for nearly a century," *id.* at 687, Congress has regulated transit no more than the activities specifically protected in *National League*. In contrast to the industry-specific laws aimed at railroads, the National Labor Relations Act, cited by the Government, is a law of general application that applies to all exempt *National League* activities when performed by nonpublic employers. It encompasses most all private sector activities and does *not* apply to the States. If this generally applicable law could defeat Tenth Amendment immunity, then those activities in *National League* having substantial private sector involvement (notably hospitals, sanitation, and parks and recreation) would be denied immunity as would any new function undertaken by the States if it had ever been performed by the private sector. The discrimination laws, also cited by the Government, are irrelevant because they apply to all state and local government activities, including those which this Court protected in *National League*. The FLSA amendments of 1961 and 1966 likewise cannot satisfy the requirement that transit be subject to federal regulation that is long standing and comprehensive. For its first twenty-three years, the FLSA exempted all transit employees. The 1961 amendments brought limited minimum wage coverage to certain large systems, while granting a total exemption from the overtime requirements. Even the 1966 amendments did not cover all transit systems and con-

tinued the overtime exemption for operating employees, who were the vast majority of the work force. Not until 1974 were all publicly owned transit systems swept under the FLSA along with virtually all other state and local government employees; however, those amendments, which are the very subject of this litigation, cannot evidence long-standing comprehensive regulation of transit.

3. Unlike the railroad industry, which had no "history of long standing state regulation," *LIRR*, 455 U.S. at 688, state and local government regulation of street transportation in Texas dates back more than seven decades. Since at least 1913, the cities have had exclusive control over their streets and highways. In 1915, the City of San Antonio started regulating vehicles operated to transport passengers for hire. This continued until 1959, when the City acquired the local transit system pursuant to a state law, which was followed in 1978 by the creation of SAMTA.

4. Unlike passenger railroads—only two of which are publicly owned, *id.* at 686 n.12—state and local governments are the principal providers of transit services. Transit in San Antonio has been publicly owned and operated since 1959. By 1979, all eighteen municipal transit systems in Texas were publicly owned or operated. Nationally, 94% of all transit riders use public mass transit. By at least 1965, over one-half of all transit employees worked for publicly owned systems.

5. Unlike the Long Island Railroad, which "operated under [the Railway Labor Act] for 13 years without claiming any impairment of its traditional sovereignty," *id.* at 690, SAMTA has never accepted FLSA coverage and promptly brought this lawsuit after the Government ruled that local transit is constitutionally within the FLSA.

B. The Government's all-consuming preoccupation with history conflicts with *LIRR*, which shunned a "static historical view," *id.* at 686, as well as the legacy of Supreme Court decisions construing the Constitution as a living document requiring flexibility to meet changing conditions and values.

The Tenth Amendment, no less than any other part of the Constitution, cannot be shackled by static, historical concepts of state activities. Current realities of urban mass transit clearly entitle transit to *National League* protection.

C. Transit is analogous to the other exempt *National League* activities. Congress has emphasized that transit is as essential as fire and police protection, sewers, and the other protected activities. Similarly, Texas, like many other states, has by law declared public transit authorities to be performing "essential governmental functions", art. 1118x § 6(a), thereby showing that it regards transit "as [an] integral part of [its] governmental activities. . . ." *National League*, 426 U.S. at 854 n.18. Furthermore, transit shares many characteristics common to the activities identified as exempt in *National League*. For example, hospitals have their roots in the private sector and remain a predominantly private-sector activity. Hospital development has been significantly stimulated by federal funding since at least 1946. Garbage collection and parks and recreation have substantial private sector involvement.

The Government disingenuously attempts to distinguish transit from other constitutionally protected activities on the ground that Congress referred to unfair competition in covering public transit. When Congress amended the FLSA in 1966, it specifically stated that it was also including public schools and hospitals in order to prevent unfair competition. The Government relied on this in *Maryland* v. *Wirtz*, and in *National League* claimed that other state activities (ultimately held traditional by this Court), compete with the private sector. Of course, as a practical matter, there is no competition in urban mass transit, which today is a subsidized public service. Contrary to the Government's claim, transit cannot be distinguished from exempt activities because transit is partially subsidized by user charges since a number of the activities listed in *National League* also collect substantial user fees.

D. It is irrelevant that the federal government, through UMTA funding, allegedly hastened the public takeover of transit systems.

First, neither SAMTA nor its publicly owned predecessor received one cent of federal assistance in acquiring the local transit operations in San Antonio.

Second, any proposition that federal funding of transit permits federal law to displace state law is inconsistent with this Court's holding in *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15, 27 (1982) that "Congress made it absolutely clear [in UMTA] that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers." The applicability of *Jackson Transit* to this case is underscored by section 13(c) of UMTA, which requires fair and equitable arrangements to protect the interests of employees affected by federal assistance. Nothing in the arrangements between SAMTA and the Government requires FLSA overtime, and they, as well as section 9(d) of UMTA, specifically preclude any other restriction of SAMTA's rights.

Third, the Government is really making a Spending Power argument in a Commerce Clause case. *National League* recognized this distinction, and it is clear from the Court's decision that federal funding is irrelevant in determining whether an activity is protected. However, even if federal funding were relevant, funding of transit is no greater and, in some cases, less than that provided to several of the other activities mentioned in *National League*, at least two of which (hospitals and solid waste management) proliferated under the stimuli of federal financial assistance.

II. Under *National League*, "integral operations in *areas* of traditional governmental functions" are protected by the Tenth Amendment. 426 U.S. at 852 (emphasis added). Under this standard, transit is also exempt from the FLSA because it is an integral component of the traditional state activity of providing and maintaining means of public transportation. Recent appellate decisions have emphasized that government involvement in building and maintaining roads for public transportation is a traditional activity, even from an historical standpoint. With changing needs and evolving technology, the

States have adopted multifaceted transportation plans that comprise not only road building and maintenance, but mass transit as well.

III. Even if transit were not exempt under *National League*, the FLSA still cannot be constitutionally applied to SAMTA or any state or local government employee absent a constitutionally valid amendment. First, the 1974 amendments to the FLSA purport to cover virtually all state and local government employees by adding "public agenc[ies]" to the definition of "employer" and defining "public agency" as, among other things, "the government of a state or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." 29 U.S.C. §§ 203(d), 203(x) (1976). In order to make these definitions constitutionally valid, a court would have to add words of limitation to the definitions. The severability clause in the FLSA does not permit the Court to add words to the amendments that are not currently there. Second, the effect of this Court's decision in *National League* is to remove the great majority of state and local government employees from the FLSA. That Act sets up no dichotomy between traditional and nontraditional governmental functions, and to apply the 1974 amendments to the small group of public workers performing nontraditional functions would create a program different from the one Congress actually adopted.

ARGUMENT

I. TRANSIT IS A TRADITIONAL FUNCTION.

In *National League*, this Court held that the States' power to detemine their employees' wages, hours and overtime compensation is an "undoubted attribute of state sovereignty." 426 U.S. at 845.[8] It identified the question before it as whether

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[8] Garcia (brief p. 10) agrees that "*National League of Cities* establishes that the fixing of wages and hours for public employees is 'indisputably [an] attribute[ ] of state sovereignty.' " The Government's brief (pp. 43-44 n. 34), however, cites *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), for the proposition that not "every state employment *decision* . . . should be considered to

determinations of wages, hours and overtime "are 'functions essential to [the States'] separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. The Court discussed the effect the FLSA amendments would have on fire and police protection, but, noting disagreement among the parties as to the "precise effect the amendments will have in application," concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented. . . ." *Id.* at 851. *Accord, EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1063 (1983).[9] The Court then held that "application [of

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be an exercise of an 'undoubted attribute of state sovereignty.' " (emphasis added). If the Government contends that the "attribute of sovereignty" test is still an issue in FLSA cases, it is ignoring the clear holding in *National League* and is confusing decisionmaking — *e.g.*, the determination of wages and hours in *National League* and forced retirement based on age in *EEOC* v. *Wyoming* — with the characterization of state activities — *e.g.*, hospitals, transit, etc. — as traditional functions.

[9] The Government (brief pp. 43-46) challenges the impact FLSA coverage of transit will have on the States. Not only is the Government's discussion of impact inappropriate in view of this Court's decisions in *National League* and *EEOC* v. *Wyoming*, but it flies in the face of the Government's representation in its brief to the trial court that "allegations of adverse impact are irrelevant to a determination of coverage by the Act." R. 389. *National League* has already decided that the FLSA amendments have sufficient effect on state decisionmaking to preclude their constitutional application to traditional activities because they displace state "choices" regarding the wages and hours of their employees. 426 U.S. at 850. This is evident from the Court's summary, and generic, exemption of most listed activities without any impact analysis. If impact were relevant to a determination of traditionality, then a specific impact analysis would have been required for each of the activities exempted and, presumably, for each government unit providing each type of activity.

Even if impact were considered, application of the FLSA to transit would be foreclosed. The Government recently published a study showing the effect FLSA coverage of transit will have on the States. Advisory Comm'n on Intergovernmental Relations, *Mass Transit and the Tenth Amendment* 23 (1983) ("A labor-intensive industry, labor costs are estimated to comprise anywhere from 65 percent to 73 percent of the operating costs of mass transit. Therefore, any policy affecting labor costs could be expected, correspondingly, to have a profound effect on mass transit finances . . . . Strict

the FLSA amendments] will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships" in activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

Contrary to the Government's position, which is largely premised on decisions of this Court that involved statutes other than the FLSA, concepts of the States' separate and independent existence[10] and a federal-state interest balancing

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application of overtime provisions would still add considerably to transit agencies' operating budgets.") *See also* affidavit of Wayne Cook, R. 203 (peak passenger loads create fluctuating manpower needs during SAMTA's operational hours and require that regular drivers be scheduled for shifts ranging between 8 hours and 8 hours 45 minutes, making it extremely difficult to limit drivers to 8 hour shifts "without seriously disrupting service to transit passengers"). FLSA application would straitjacket local governments into complying with federally imposed requirements, thereby foreclosing the ability to structure essential transit services by making changes in wage and hour policies, as local needs dictate. The possibility that the States may need flexibility to restructure employment practices is portended by the Administration's efforts to eliminate transit operational assistance. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Major Themes & Additional Budget Details Fiscal Year 1983* at 121-22 ("*Budget Details 1983*").

[10] The Government's jurisdictional statement (p. 21; see also pp. 10, 25 & brief pp. 16, 21, 33, 34, 43) contends that for public transit to be exempt under *National League*, it must be "an essential aspect of the states '*separate* and *independent* existence.' " The Government has misread *National League*, which posited the question before it as follows:

> One undoubted attribute of state sovereignty is the States' *power to determine* the *wages* which shall be paid to those whom they employ in order to carry out their governmental functions, what *hours* those persons will work, and what *compensation* will be provided where these employees may be called upon to work overtime. *The question we must resolve* here, then, *is whether these determinations are " 'functions essential to separate and independent existence,' "* [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them.

426 U.S. at 845-46 (emphasis added).

In answering this question in favor of the States, the Court conclusively decided that the power of the States to make wage and hour determinations

test[11] are not a concern in this case since this Court has already resolved these issues in favor of the States for purposes of the FLSA. Rather, after *National League*, the only task remaining for the Court in FLSA cases is to complete the "catalogue of the numerous line and support activities" which are "integral operations in areas of traditional governmental functions." *Id.* at 851 n.16, 852. Thus the issue before the Court is whether

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is a function essential to their separate and independent existence and that Congress cannot regulate the States' prerogatives in this area when a traditional activity is involved. The "separate and independent existence" test referred to by the Government is irrelevant in determining whether an activity is traditional, but rather goes to the question whether the particular federal regulatory scheme unconstitutionally impairs state choices that are essential to separate and independent existence—such as, in *National League*, the prerogative to prescribe wages and hours; in *LIRR*, the power to regulate railroad labor relations; and, in *EEOC* v. *Wyoming*, 103 S. Ct. 1064 (1983), the right to set employment conditions on the basis of age. *National League* has already determined that the FLSA's interference with the States' right to set the wages and hours of public employees "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," *EEOC* v. *Wyoming*, 103 S. Ct. at 1062, thereby endangering the States' separate and independent existence, and that issue accordingly is not present in this case. This is underscored by the fact that parks and recreation could not be exempt under the Government's theory since they are not essential to the States' separate and independent existence; nor could hospitals and refuse collection (sanitation) in view of the substantial private sector involvement in those activities. Similarly, libraries and museums, which the Secretary of Labor has exempted by regulation (29 C.F.R. § 775.4), would not meet the Government's test for immunity. However, even if this were the test, transit would qualify since it is as important to the States as the exempt *National League* activities. See *infra*, pp. 33-38.

[11] The Government (brief p. 46) refers to the balancing test, which traces its genesis to Justice Blackmun's concurring opinion in *National League*, 426 U.S. at 856. The Government fails to recognize that this Court has already struck the balance in favor of the States in FLSA cases and that balancing is required only with respect to other federal regulation "such as environmental protection, when the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* Nothing in *National League* or its progeny suggests that balancing plays any role in determining whether an activity is an integral operation in an area of traditional governmental functions.

SAMTA (and local public mass transit generally) is one of these activities. Transit is not materially different from the other activities exempted in *National League*, and the district court's decision finding transit to be exempt is entirely consistent with *National League* as well as the Court's unanimous decisions in *LIRR* and *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

A. TRANSIT SATISFIES THE TESTS FOR *NATIONAL LEAGUE* IMMUNITY ARTICULATED IN *LIRR*.

In *LIRR*, the Court held that the Railway Labor Act can be constitutionally applied to a "[state-owned] railroad engaged in interstate commerce," but acknowledged that "under *most* circumstances federal power to regulate commerce [cannot] be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 685, 686 (emphasis added). Although *LIRR* involved a different statute raising different considerations from the FLSA, the factors upon which the Court's ruling turned support the decision below.

In *LIRR*, the Court focused upon four crucial attributes of railroads, which do not exist in the case of local transit: (1) railroads are part of a national rail network requiring uniform federal regulation; (2) railroads have been subject to comprehensive, long-standing federal regulation; (3) railroads have no comparable history of state regulation; and (4) the railroad in *LIRR* was only one of two state-owned passenger railroads in the United States. The Court also emphasized that the Long Island Railroad voluntarily operated for years under the Railway Labor Act without any claim of disruption. As shown below, each of these elements is inapplicable to transit.

1. Transit Is Not Part Of A National Transportation Network.

In *LIRR*, the Court emphasized the interstate nature of railroads and their role as a component part of the national rail system. The Court noted that the Long Island Railroad "connects with lines of railroads which serve other parts of the

country[,] . . . supplies Long Island's only freight service [and] does a significant volume of freight business." 455 U.S. at 680 n.1. The Court concluded:

> [T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. . . .
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> . . . To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

Id. at 688-89.

In contrast, SAMTA provides a purely local service in Bexar County. Furthermore, during its first two fiscal years, approximately twenty percent of its local line-service passengers were students or children, and another 3.3 million students were carried on nonline service under arrangements with school districts.[12] SAMTA also serves Bexar County hospitals and provides mini-bus service in the downtown area.

Unlike the railroad industry, there is no national transit system; nor has Congress ever concluded that "uniformity" in transit is essential. In fact, the contrary is evident from statements made by the Administration in its effort to eliminate transit operating subsidies:

> Primary responsibility for mass transit should remain with State and local governments. *Decisions about* service levels, equipment and facilities, fares, *wage rates* and management practices *are better left to local decision-makers*. Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions.

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[12] In this respect, SAMTA is engaged in an activity integral to education.

Budget Details 1983 at 121 (emphasis added). Any disruption of a transit system is a purely local problem which, unlike an interstate railroad, has no impact on other transit systems serving other localities.[13]

The Government's reference in its brief (pp. 33, 36) to UMTA's characterization of the decline of transit services as a "national problem" and the Government's portrayal of public transit as a "venture in 'cooperative federalism' " between the States and federal government does not enhance its position one whit since Congress has passed laws and made the same observations about virtually all of the other activities exempted by *National League*.[14] Examples are:

Health and Hospitals: Safe Drinking Water Act establishes a "joint Federal-State system for assuring compliance with

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[13] The Government (brief p. 47) claims that because transit impacts "interstate commerce the FLSA may constitutionally be applied to public transit employees." This logic is specious and circular. If the Government did not claim a nexus between transit and interstate commerce, the FLSA could not be applied to transit. Furthermore, in amending the FLSA to encompass virtually all public employees in 1974, Congress emphasized the impact on interstate commerce of state and local government activities. *See, e.g.*, S. Rep. No. 93-690, 93d Cong., 2d Sess. 24 (1974). *See also Maryland* v. *Wirtz*, 392 U.S. 183, 194-95 (1968) (finding that public schools and hospitals affect commerce). The constitutional question arose in *National League* only because the regulated state activities affected commerce. *See id.* 426 U.S. at 840-41.

[14] For the same reason, the Government's reliance (brief pp. 14, 32, 46-47) on the fact that some transit systems are "areawide" and some "cross state lines" is misplaced since the same can be said of activities expressly protected by *National League*. *E.g.*, S. Rep. No. 96-96, 96th Cong., 1st Sess. 33-34, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1306, 1338-39 (of 205 **health** service areas, 15 are interstate, one is tristate and 13 encompass interstate SMSA's); S. Rep. No. 11, 88th Cong., 1st Sess. 5, *reprinted in* 1963 U.S. Code Cong. & Ad. News 664, 667 (Secretary of the Interior should "encourage interstate and regional cooperation in the planning, acquisition, and development of outdoor **recreation** resources"); Am. Pub. Works Ass'n, *History of Public Works in the United States 1776-1976* at 416, 418 (1976 ["*History of Public Works*"]) ("[i]nterstate compacts have offered a more effective means of promoting regional **water pollution** control" . . . the 1948 Water Pollution Control Act provided for "interstate cooperation"); H.R. Rep. No. 899, 89th Cong., 1st Sess. 8, 27, *reprinted in* 1965 U.S. Code Cong.

these standards" (H.R. Rep. No. 93-1185, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6454, 6455). National Health Planning & Resources Development Act of 1974 will "assure the development of a national health policy"; Hill-Burton Act, providing for hospital construction, was a "Federal-State partnership"; "national guidelines" for health planning are needed; it is the "responsibility of the Federal government to intervene" to upgrade large urban hospitals (S. Rep. No. 93-1285, 93d Cong., 2d Sess. 1, 19, 42, 59, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7859, 7882, 7898).

Sanitation: Solid Waste Disposal Act requires that "immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem"; "[t]he problem of solid waste disposal is all-pervasive and has become national in scope . . . [and] will require the combined resources of the Federal, State, and local governments as well as industry and research institutions" (H.R. Rep. No. 899, 89th Cong., 1st Sess. 7, 22, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3614, 3627). "[P]roblems of waste disposal . . . have become a matter national in scope" (Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (Supp. V 1981)).

Education: The "purpose" of the Elementary & Secondary Education Act of 1965 "is to meet a national problem" (S. Rep. No. 146, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1449).

Fire: "Fire is a major national problem" (S. Rep. No. 93-470, 93d Cong., 1st Sess. 6, *reprinted in* 1974 U.S. Code Cong. &

& Ad. News 3608, 3615, 3634 (federal financial assistance is needed to encourage and help the states and interstate agencies undertake surveys of **solid waste** and develop plans on a "statewide or interstate basis" . . . "interstate and interlocal cooperation" is needed); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288(a)(3) (1976) (providing for "areawide **waste treatment** management plans" for multistate areas); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6946(c) (1976) (providing for "interstate [**solid waste** disposal] regions"); **Crime Control** Act of 1973, Pub. L. No. 93-83, 87 Stat. 197, 200 (1973) (amended 1979) (providing for "interstate metropolitan regional planning units").

Ad. News 6191, 6196). The federal government is a "partner in attaining" the goal of improving the quality of local fire service delivery (Advisory Comm'n on Intergovernmental Relations, *The Federal Role in Local Fire Protection* 18 (1980)).

Police: "Crime is a national catastrophe"; "[t]here are certain national objectives which are vital to every citizen of this country, and the elimination of crimes is one of the foremost among these objectives" (S. Rep. No. 1097, 90th Cong., 2d Sess. 31, 179, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2117, 2239). The role of the Law Enforcement Assistance Administration is a "partner with State and local governments" (S. Rep. No. 91-1253, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5804, 5805).

Each of these "national" problems has received congressional attention and support. Yet, each is exempt from FLSA coverage.

2. Transit Has Not Been Subject To Comprehensive And Long-Standing Federal Regulation.

In *LIRR*, the Court relied heavily on the fact that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." 455 U.S. at 687. The Court concluded that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas *traditionally subject to federal statutory regulation.*" *Id.* (emphasis added).

Unlike the "national rail system," *id.* at 688, federal regulation of transit has been no greater than that governing the activities specifically exempted by *National League*. There is no scheme of federal regulation designed to provide uniformity among transit systems, as in the case of railroads, which are subject to an array of industry-specific federal laws.[15] The Government's claim (brief pp. 39-43) that federal regulation of

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[15] In addition to the statutes cited in *LIRR*, there are many other federal regulatory statutes directed exclusively at railroads. Title 45 of the U.S. Code deals solely with railroads.

transit distinguishes that service from the activities held constitutionally protected in *National League* finds no support in the federal statutes it cites and in fact underscores the minimal federal regulatory role in the transit field.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), and therefore the Labor-Management Reporting & Disclosure Act, 29 U.S.C. § 401, *et seq.* (1976 & Supp. V 1981) (see definition of "employer," *id.* § 402(e)), apply to the activities specifically exempted in *National League* when performed by private sector employers. *E.g.*, **Hospitals**[16]: *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978). **Schools:** *Cornell University*, 183 NLRB 329 (1970). **Fire and Police Protection:** *Florence Volunteer Fire Department, Inc.*, 265 NLRB No. 134 (1982); *Pinkerton's National Detective Agency, Inc.*, 90 NLRB 532 (1950). **Sanitation:** *Dale Service Corp.*, 263 NLRB No. 114 (1982) (sewage treatment); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977) (garbage collection); *Oakland Scavenger Co.*, 98 NLRB 1318 (1952) (same). **Recreation:** *Coney Island, Inc.*, 140 NLRB 77 (1962); *Union News Co.*, 112 NLRB 584 (1955) (ice skating rink). *See also Management Services, Inc.*, 108 NLRB 951 (1954) (municipal services).

A law of general application that regulates virtually every private employer in the country, including those *National League* activities (*e.g.*, hospitals, schools and sanitation) that have substantial private sector involvement, cannot be equ-

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[16] Hospitals, including nonprofit ones, were covered by the NLRA when it was originally enacted. *NLRB* v. *Central Dispensary & Emergency Hosp.*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945). In 1947, the NLRA was amended to exempt nonprofit hospitals, Labor Management Relations Act, ch. 120, 61 Stat. 136, 138 (1947), and thereafter the NLRB asserted jurisdiction over company hospitals. *E.g.*, *General Elec. Co.*, 89 NLRB 1247 (1950). In 1974, Congress deleted the exemption for nonprofit hospitals and incorporated special provisions in the NLRA directed specifically at the hospital industry. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (1974). *See generally* S. Rep. No. 93-766, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946.

ated with the comprehensive federal statutes specifically regulating railroads. In view of the almost universal applicability of the NLRA, the Government's argument would impose the "static historical view of state functions" shunned by this Court in *LIRR*, 455 U.S. at 686, since any new activity undertaken by a state—no matter how necessary or important—would be denied Tenth Amendment protection if it was previously performed to any degree by the private sector. This would render meaningless the Court's *LIRR* holding that only state acquisitions that "erode federal authority" are not protected. *Id.* at 687. Furthermore, as noted by the district court (Gov't J.S. 9a), the NLRA "contains an exemption for state and local governments." It would indeed be anomalous to deny Tenth Amendment protection to the States based upon a statute that Congress specifically decreed shall not apply to the States. Contrary to the Government's assertion (brief p. 40), a state acquiring a transit system, or any other private entity, does so knowing that it will *not* be subject to the NLRA.

The Government also relies on the fact that the Equal Pay Act (29 U.S.C. § 206(d) (1976)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1976 & Supp. V 1981)) apply to transit. This logic is circular because those same statutes apply to public employers providing activities exempted by *National League*. *E.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's application to the States); *Pearce* v. *Wichita County Hospital Board*, 590 F.2d 128 (5th Cir. 1979) (applying Equal Pay Act to a public hospital).

The Government's reliance on the 1961 and 1966 FLSA amendments is misplaced. Private transit systems were by statute exempt before 1961, and therefore during its first twenty-three years, the FLSA was totally inapplicable to transit. The 1961 amendments extended the FLSA only to private systems with revenues exceeding one million dollars, but exempted all employees from the overtime requirements. Even the 1966 amendments continued the overtime exemption for operators and excluded systems whose rates or services are

not subject to regulation by a state or local agency.[17] It was not until 1976 that even private transit was brought fully under the FLSA's overtime requirements, but this was pursuant to the 1974 amendments, whose constitutionality is challenged in this very action, and which cannot provide bootstrap support for the Government's position. The vast majority[18] of transit employees have been subject to the full play of the FLSA only since 1976, and this hardly constitutes long-standing or comprehensive federal regulation of wage and hour practices or any other aspect of transit operations.

3. There *Is* Long-Standing State Regulation Of Transit.

In holding the Long Island Railroad to be nontraditional, the Court also relied upon the fact that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry."[19] 455 U.S. at 688. The reverse is true of transit in Texas and San Antonio.

State and local regulation of street transportation in Texas dates back at least 70 years. In 1913, the Texas legislature

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[17] The Government's claim (brief p. 40) that "90% [of all transit systems] were still privately owned in 1967" is misleading. In 1965, 56% of all transit workers in the United States were employed by publicly owned systems, which means that a majority of transit employees in the country were not covered by the FLSA or the NLRA. *Amendments to the Fair Labor Standards Act: Hearings on S. 765, et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 89th Cong., 1st Sess. 309 (1965) ("*Hearings on S. 765*").

[18] *See* Garcia Appendix below at 62, which shows that during SAMTA's first fiscal year, about 69% of its payroll went to operators.

[19] The Government's argument (brief pp. 21-24) that a "history of state regulation of private transit" is not an appropriate consideration thus improperly disregards an important element of the test for immunity articulated in *LIRR*. Furthermore, the Government's claim (brief pp. 23-24) that the States made a "fundamental policy decision to pursue their objectives through regulation of nongovernment transit providers" is plainly wrong and is refuted by the very data cited in the Government's own brief (p. 17) that publicly owned transit systems carry over 94% of all transit riders.

delegated to the cities exclusive control over their streets and highways, including the powers:

> To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving bond or other security for the operation of the same.
>
> To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire. . . .

1913 Tex. Gen. Laws, ch. 147, § 4, at 314, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175 §§ 20, 21 (Vernon 1963).

In 1915, the City of San Antonio passed a comprehensive ordinance to regulate vehicles operated for hire to transport passengers. San Antonio, Tex., Ordinance OF1-1 (Mar. 8, 1915). The ordinance required owners of vehicles, including motor buses, to obtain a franchise from the City for transporting passengers for hire on city streets; established license application and fee specifications and insurance or bond requirements; and specified vehicle safety features such as lighting, speed and driver age and conduct. Another comprehensive ordinance was enacted in 1921, updating the 1915 ordinance and including a designated motor bus route and terminals. San Antonio, Tex., Ordinance OF-266 (Dec. 1, 1921).

The City continued to regulate fares, routes, schedules and franchises of private transit companies until 1959, when it created SATS and purchased the assets of SATS' predecessor pursuant to a state law authorizing cities to issue bonds for the purchase, construction or improvement of street transportation systems. Tex. Rev. Civ. Stat. Ann. art. 1118w (Vernon 1963 & Supp. 1982-83). Public mass transit in San Antonio changed again after state legislation in 1973 authorized a change from a municipal to a metropolitan facility and specifically designated publicly owned transit systems as performing "essential governmental functions." Art. 1118x, § 6(a). *See*

also §§ 6(p), 6C(a), 13A.[20] The history of transit in San Antonio, from a city-controlled private franchise, to a city-owned system in 1959, to an autonomous metropolitan authority in 1978, illustrates the traditional role of the city and state in ensuring efficient transportation for the convenience and welfare of local citizens.[21]

4. State And Local Government Are The Principal Providers Of Transit.

In finding the Long Island Railroad not to be a traditional function, this Court noted that only two of seventeen commu-

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[20] Other Texas statutes regulating intracity bus systems include Tex. Rev. Civ. Stat. Ann. art. 1015 (Vernon 1963) (authorizing cities to license, tax and regulate omnibus drivers); art. 1181 (Vernon Supp. 1982-83, *original version at* 1913 Tex. Gen. Laws, ch. 147, § 9, at 317) (confirming that cities have exclusive power to grant franchises for the use of public streets); art. 6663c (Vernon 1977 & Supp. 1982-83) (authorizing state assistance to cities for establishment of mass transit systems); art. 6675a-2 (Vernon 1977) (providing for registration of motor vehicles); art. 6675a-5 (Vernon Supp. 1982-83) (setting annual license fees for street and suburban buses); art. 6675a-13 (Vernon 1977) (establishing license plate requirements for motor vehicles); art. 6687b, § 5 (Vernon 1977) (establishing requirements for drivers of school buses); art. 6698 (Vernon 1977) (authorizing towns to collect city permit fees on motor vehicles transporting passengers for hire).

[21] Unlike the States' virtually unencumbered power to regulate transit, the States are forbidden from regulating many aspects of interstate railroads. In *LIRR*, 455 U.S. at 687, this Court cited *Wabash, St. L. & P. Ry.* v. *Illinois*, 118 U.S. 557 (1886) (states cannot regulate interstate freight rates). Other examples include *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761 (1945) (regulation of train length); *Transit Comm'n* v. *United States*, 289 U.S. 121 (1933) (regulation of trackage agreements); *Colorado* v. *United States*, 271 U.S. 153 (1926) (prohibiting abandonment of lines); *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (regulation of locomotive equipment); *Missouri, Kan. & Tex. Ry.* v. *Texas*, 245 U.S. 484 (1918) (regulation of departure times and length of connection time); *Erie R.R.* v. *New York*, 233 U.S. 671 (1914) (limitation on employee hours of service); *Herndon* v. *Chicago, R. I. & P. Ry.*, 218 U.S. 135 (1910) (requirement that trains stop at all junction points); *Houston & Tex. Cent. R.R.* v. *Mayes*, 201 U.S. 321 (1906) (requirement that railroads provide cars for delivery of freight); *Illinois Cent. R.R.* v. *Illinois*, 163 U.S. 142 (1896) (requiring diversion of trains to the county seat); *Bowman* v. *Chicago & N.W. Ry.*, 125 U.S. 465 (1888) (prohibition against transport of intoxicating liquors into the state without proper certificate).

ter railroads in the United States were public. One of those was the Long Island itself, which was converted from a "private stock corporation to a public benefit corporation" in 1980. 455 U.S. at 681. The other was the Staten Island, which became public in 1971. *Id.* at 686 n.12. *See also Employees* v. *Missouri Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973) (state-owned railroad in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964) was "a rather isolated state activity").[22]

Although transit services were once predominantly provided by the private sector, this has not been true for many years. The rudimentary street transportation of the first half of this century has evolved into a new mass transit technology serving entire urban areas.[23] The States have recognized that modern transit services cannot be operated profitably and constitute a service as essential to survival as fire and police. In order to ensure the continuation of vital transit services, the States, of necessity, have added transit as a component part of the array of "governmental services which their citizens require," *National League*, 426 U.S. at 847, and have been the principal provider of transit services for many years.[24]

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[22] Commuter railroads are not considered part of mass transit. "The urban transit industry includes all 'companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules' *except computer railroads* and limousine service. . . ." Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. & Lab. Rel. Rev. 96 (1971) (emphasis added).

[23] The Government's reliance (brief p. 20) on footnote 11 in *LIRR*—in which the Court stated that a state-operated common carrier would be subject to Commerce Clause regulation—untenably stretches the Court's statement. The cited portion of that footnote is a quotation from Chief Justice Burger's concurring opinion in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978), which in turn was derived from *United States* v. *California*, 297 U.S. 175 (1936). That case involved the Federal Safety Appliance Act, 45 U.S.C. § 1, *et seq.* (1976 & Supp. V 1981), which covers "common carrier[s] engaged in interstate commerce *by railroad*." (emphasis added). Both textual sentences surrounding footnote 11 in *LIRR* pertain to railroads, and it would appear that the Court's reference to common carriers also pertained to railroads.

[24] A major premise of Garcia's brief is that publicly owned transit systems constitute business enterprises. Garcia's assertion is belied by the experience of the past quarter century. Congress enacted UMTA because "in

Local transit in San Antonio has been publicly owned and operated since 1959. By 1979 all eighteen municipal transit systems in Texas operating five or more vehicles in scheduled, fixed route, intracity service were publicly owned or operated. Tex. Dep't of Hwys. & Pub. Transp., *1979 Texas Transit Statistics* 1 (1980). Nationally, 94% of all transit riders use public mass transit. APTA, *Transit Fact Book 1981* at 27.

The figures in the Government's brief (pp. 17-18) showing that roughly half of the 686 transit systems in urban areas over 50,000 population are public is misleading since those 686 systems include the smallest, with only one bus, and the largest with over 2000 buses. The publication from which these figures are taken reflects that the principal provider of transit services in each of the 25 largest urban areas in the United States and in at least 100 of the 106 urban areas having populations exceeding 200,000 is public. U.S. Dep't of Transp., *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* (1981) ("*DOT Directory*"). The Government's claim (brief p. 49) that "in 1966 . . . transit service was, by any measure, still predominantly a service provided by private enterprise" is repudiated by its own brief (p. 17), which states that "[i]n 1967 over 50% of all transit riders patronized publicly owned systems." Furthermore, by 1965, 56% of all transit employees worked for publicly owned systems. *Hearings on S. 763* at 309.[25]

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recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten continuation of this essential public service. . . ." 49 U.S.C. § 1601b(4) (1976). In San Antonio, SAMTA's fare box receipts are less than 25% of its operating expenses. According to the Government's own brief (p. 49 n.37), nationally fares constitute 40.7% of operating revenues. Just to break even on expenses, transit fares would have to increase several fold—to the detriment of the poor, the elderly and minorities, who constitute the greatest group of transit patrons. For transit to try to operate as a business enterprise would sound its death knell.

[25] The Government's attempt (brief p. 19) to equate the histories of public mass transit and passenger railroads conflicts with the position it took in its amicus brief in *LIRR*. For example, on page 12 of that brief, the Government

5. SAMTA Has Never Acceded To FLSA Coverage.

In *LIRR*, the Court relied on the fact that the "State knew of and accepted" the Railway Labor Act and "operated under [it] for 13 years without claiming any impairment of its traditional sovereignty." 455 U.S. at 690. When the Long Island Railroad was sued for a declaratory judgment that the Railway Labor Act applied, its response "was to acknowledge that the Railway Labor Act applied." *Id.* Then, while the suit was pending, it converted to a public benefit corporation "apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law." *Id.* at 681.

Unlike the Long Island Railroad's acceptance of the Railway Labor Act, SAMTA has never accepted FLSA coverage of its operations. When the Deputy Wage and Hour Administrator issued his September 17, 1979 ruling that local transit is constitutionally within the FLSA, SAMTA promptly brought this action challenging the ruling.

B. AS A "LIVING DOCUMENT," THE CONSTITUTION MUST BE GIVEN FLEXIBILITY TO MEET CHANGING TIMES, AND THEREFORE CONSTITUTIONAL DOCTRINE REGARDING STATE ACTIVITIES CANNOT BE SHACKLED BY STATIC, HISTORICAL CONCEPTS.

The Government (brief p. 25) states that it "take[s] the teaching of *Long Island R.R.* to be that primacy is assigned to

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insisted that the Long Island Railroad "remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable from conventional intraurban transit systems.*" (emphasis added). The Government contended that this distinction "is firmly grounded in the separate histories of these two sectors of the transportatin industry, in the applicable law, and in the usages of the industry," *id.* at 25 n.19, and contrasted the 2 public commuter railroads (out of 17) with the more than 1000 transit systems in the United States, "nearly half of [which], including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies." *Id.* at 27 n.20. The Government cited these statistics in support of its contention that "public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads." *Id.*

historical evidence in the Tenth Amendment analysis . . . ." Later in its brief (p. 50) the Government attempts to denigrate any analysis that is not based strictly upon historical considerations as amounting to "creeping unconstitutionality." The Government's inflexible preoccupation with history and its refusal to acknowledge that changing societal values and technological innovations play an important role in constitutional analysis is directly repudiated by this Court's rejection in *LIRR* of a "static historical view of state functions generally immune from federal regulation." 455 U.S. at 686. It is also diametrically opposed to the constitutional jurisprudence established by this Court, which has emphasized that "the Constitution has been treated as a living document adaptable to new situations." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 681 (1952) (Vinson, C.J., dissenting). As Chief Justice Marshall stated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) over 150 years ago:

> This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

See also Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 698-99 (1976) ("Because of the general language used in the Constitution, judges should not hesitate to use their authority to make the Constitution relevant and useful in solving the problems of modern society.")[28]

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[28] The same principles appear in Eighth Amendment cases. *E.g.*, *Furman* v. *Georgia*, 408 U.S. 238 (1972) (p. 327: " '[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a

This Court has recognized that the concept of a living constitution has particular applicability to the evolving role of the States in serving the needs of their citizens. For example, in *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60 (1978), Justice Rehnquist emphasized that " '[v]iable local government may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions.' " *Id.* at 75 (quoting *Sailors* v. *Board of Education*, 387 U.S. 105, 110-11 (1967)). *See also Helvering* v. *Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("[T]here cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental . . . . [T]he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.").

Consistent with the concept that the Tenth Amendment is not a static reservation of those States' rights existing when our forefathers enacted the Bill of Rights, we must consider publicly owned mass transit "in the light of its full development and its present place in American life throughout the Nation." *Brown* v. *Board of Education*, 347 U.S. 483, 492-93 (1954). When viewed in its present developed stage—where 94% of all passenger trips are on publicly owned transit systems, where

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maturing society.' " [Marshall, J., concurring]) (p. 382: The Amendment's "applicability must change as the basic mores of society change." [Burger, C.J., dissenting]) (p. 408: "[T]he Cruel and Unusual Punishments Clause 'may acquire meaning as public opinion becomes enlightened by a humane justice.' " [Blackmun, J., dissenting]) (p. 420: "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by their authors." [Powell, J., dissenting]); *Weems* v. *United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.")

local citizenry demand efficient, low cost mass transportation services as an essential governmental service, and where the private sector cannot provide this service—it should be clear beyond peradventure that publicly owned mass transit is within the protective umbrella of the Tenth Amendment.

Perhaps most apposite to transit are the Court's observations in *Brush* v. *Commissioner of Internal Revenue*, 300 U.S. 352 (1937), tracing the evolution of private water service into an essential function of government:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions . . . .
>
> We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not be be regarded as nonexistent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning.

Id. at 370-71.

Although public transit, like water service, was once largely a private function, it has evolved into an essential function of state and local government, and this Court's conclusions are no less applicable to transit today than they were to water service forty-seven years ago.[27] *See also Amersbach* v. *City of Cleve-*

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[27] For this reason, *Helvering* v. *Powers*, 293 U.S. 214 (1934), relied upon by the Government (brief pp. 18-19), is inapposite. *Powers* was written 50 years ago when public transportation was in its formative stage and mass transit as we know it today did not exist. As the Court noted at the time, public operation of a street railway was "a departure from *usual* governmental functions." *Id.* at 225 (emphasis added). Just as the provision of water passed from the private sector into an essential governmental service in *Brush*, transit has become a vital service provided almost exclusively by the

Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) (extending FLSA immunity to a municipal airport and holding that the "terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times").

C. TRANSIT IS ANALOGOUS TO THE OTHER STATE ACTIVITIES HELD EXEMPT IN *NATIONAL LEAGUE*.

As noted by the district court, "[a]nalogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity." Gov't J.S. 11a. Whether transit is compared to these activities generally or to the specific characteristics of those activities that are predominantly user-related—*e.g.*, hospitals, sanitation, and parks and recreation—it is clear that transit cannot be distinguished for Tenth Amendment purposes.

1. Congress has emphasized the reality that transit is as essential as fire and police protection and other vital services. For example, during hearings in 1960 on mass transit legislation, Congressman Addonizio stated:

> It is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection, and so forth.

Hearings Before Subcomm. No. 1 of the Comm. on Banking & Currency of the House of Representatives on Metropolitan Mass Transportation Legislation, 86th Cong., 2d Sess. 14

States as an "integral part[] of their governmental activities," *National League*, 426 U.S. at 854 n.18, and as a "service[] which their citizens require," *id.* at 847. Today, the States provide transit as a matter of public necessity rather than by choice, and they clearly are not "running . . . a business enterprise" or conducting a "business activit[y] which [has] as [its] aim the production of revenues in excess of costs," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1, 424 (1978) (Burger, C.J., concurring). *See also Helvering* v. *Gerhardt*, 304 U.S. 405, 418 (1937) (noting that "the state function affected [in *Powers*] was one which could be carried on by private enterprise . . . .").

(1960). During the same hearing, this message was echoed by Congressman Corbett:

> It is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police, and fire protection and other recognized public necessities.

Id. at 26. Again in 1973, the essential nature of public transportation was emphasized:

> Public transportation is as necessary to the life of the community as fully tax-supported services. In some ways it is even more essential. Potato peelings can be buried in the back yard or composted, but people cannot walk six miles to work every day.

119 Cong. Rec. 4242 (1973). One year later, Senator Biden compared mass transit to the fire department and hospitals:

> In any case, I believe it is the duty of the Government to provide such subsidies as are needed because I think mass transit is as much an essential public service as the fire department or hospitals.

120 Cong. Rec. 1042 (1974). *Accord*, 119 Cong. Rec. 4474 (1973) (remarks of Congresswoman Abzug: "transit . . . is as much of an essential service for working people as is police protection"); 120 Cong. Rec. 28,430 (1974) (remarks of Congressman Anderson: "[R]apid transit benefits everyone, and it should be thought of, I believe, as a public service, just as police and fire protection are to benefit everyone."). *See also* UMTA, 49 U.S.C. § 1601b (1976).

2. It is also clear that the States regard transit "as [an] integral part[ ] of their governmental activities," which is another test for *National League* immunity. 426 U.S. at 854 n.18. Article 1118x provides that metropolitan transit authorities are "essential governmental functions" and are not "proprietary." *Id.* §§ 6(a), 13A. Article 6663c, § 1(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) provides that "public transportation is an essential component of the state's transportation system . . . ." Examples of "other state laws decreeing public mass transit to be an essential function of government" are cited in the district court's memorandum opinion.

Gov't J.S. 12a n.7. All such laws predated this Court's decision in *National League*.

3. Closer comparison of transit with some of the specific activities exempted in *National League* underscores the propriety of the decision below. For example, public sector involvement in hospitals is not as well established as in the transit field. In 1980, of this nation's 7,051 hospitals, only 2,562 (36%), including federal facilities, were under government control. Bureau of Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1982-83* tab. 171, at 111 (1982) ("*Statistical Abstract*"). By comparison, in 1981, 598 (58%) of the 1,025 transit systems of all sizes were owned by state or local governments.[28] In 1981, about 30% of all hospital beds were in state or local government hospitals, Am. Hosp. Ass'n, *Hospital Statistics* tab. 4A, at 14 (1982), whereas, in 1980, 90% of all transit vehicles were publicly owned or leased, APTA, *Transit Fact Book 1981* tab. 3, at 43. A 1965 Senate hearing report states that "[t]here are 79 cities in which the dominant transit system is publicly owned and operated . . . [and whose] employees . . . represent approximately 56% of the total employees in the local transit industry." *Hearings on S. 763* at 309. In contrast, almost 10 years later, "56 percent of all hospital employees" worked for "non-profit, non-public hospitals." S. Rep. No. 93-766, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3948.[29] Hospitals have

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[28] *DOT Directory* 19; U.S. Dep't of Transp., *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (1981).

[29] The Government (brief pp. 36-37 & n.30) attempts to distinguish hospitals from transit on the ground that although "[t]he largest sector of the hospital industry undoubtedly is in private hands," most hospitals are nonprofit rather than proprietary. The Government's rationalization disintegrates when one considers that Congress specifically covered nonprofit hospitals in the 1966 FLSA amendments to eliminate their unfair competitive advantage over proprietary hospitals:

> Hospitals and related institutions, such as schools and colleges, which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities

their roots in the private sector and to this day are primarily private:

> The hospitals established in the eighteenth and nineteenth centuries were constructed and run by proprietary groups and church and other nonprofit organizations. This form of ownership remains the predominant characteristic of United States medical facilities.

History of Public Works 490.

Federal funding has also played a significant role in the development of hospitals. Before 1946, more than 1,000 counties in the nation had no health facilities at all. A. Treloar & D. Chill, *Patient Care Facilities: Construction Needs and Hill-Burton Accomplishments* 11 (1961). In 1946, the Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946) (*current version at* 42 U.S.C. § 291, *et seq.* (1976 & Supp. V 1981)), was passed to improve the situation, and more than half of hospital construction accomplished under that Act has been in areas with no hospital facilities. Treloar, *supra*, at 12, 14. "[R]oughly, 42 per cent of the county hospitals in operation in 1956 opened" after the end of World War II, and "[u]ndoubtedly, much of this latter growth was due to the federal grants for hospital construction received under the terms of the Hill-Burton Act of 1946. . . . In the state of Texas alone, fifty-three such institutions were founded in the interval from 1946 to 1956." J. Hamilton, *Patterns of Hospital Ownership and Control* 76 (1961).

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carried on by enterprises organized for a common business purpose. Failure to cover all activities of these nonprofit hospitals, schools or institutions will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."

H.R. Rep. No. 871, 89th Cong., 1st Sess. 15 (1965). *See also* 120 Cong. Rec. 12,988 (1974) (remarks of Congressman Williams regarding the 1974 amendments to the NLRA: "Private nonprofit hospitals should at least be subject to the same regulations, obligations, and rights that apply to proprietary hospitals. There is virtually no difference between employees of profit and of nonprofit hospitals.")

In its brief (p. 18), the Government notes that some public transit systems have management contracts with outside concerns.[30] The same arrangement exists with hospitals. In 1980, investor-owned firms held 150 management contracts with city or county hospitals. *City, County Contracts Lead to Hospital Sales*, Modern Healthcare, Sept. 1980 at 44. The most rapid growth in this area has occurred in municipal and county owned facilities such as the 1,300-bed Cook County Hospital in Chicago, J. Goldsmith, *Can Hospitals Survive?* 114 (1981), and the 1,465-bed John J. Kane Hospital in Pittsburgh, Mannisto, *For-Profit Systems Pursue Growth in Specialization and Diversification*, Hospitals, Sept. 1, 1981 at 72. Moreover, unlike transit systems, which have become predominantly publicly owned, many public hospitals are selling out to private operators. Hull, *How Ailing Hospital in South Was Rescued by a For-Profit Chain*, Wall St. J., Jan. 28, 1983, at 1, col. 1. Furthermore, hospitals have long been subject to the very same statutes cited by the Government as regulating transit. In fact, when *National League* was decided, there had been more extensive FLSA coverage of hospitals and schools since both activities were brought totally under the FLSA in 1966, whereas public transit was given an overtime exemption for operating employees until 1976 and transit systems whose fares or services were not subject to regulation by a state or local agency were not covered at all. Yet, this Court had no difficulty in exempting both hospitals and schools under the Tenth Amendment.[31]

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[30] The Government's brief (p. 18) incorrectly asserts that "more than 120" publicly owned transit systems are privately managed. The Government's source, the *DOT Directory*, shows that 123 systems have management contracts and that 31 of these are privately owned systems. *Id.* pp. 2-19.

[31] The fact that Congress specifically included public schools and hospitals in the 1966 FLSA amendments singularly destroys the Government's attempt (brief p. 44) to distinguish transit from the expressly exempt *National League* activities on the ground that the "public transit provisions are carefully targeted at a discrete function . . . ."

Facts about the exempt activity of solid waste collection (sanitation) provide analogous reenforcement for the Tenth Amendment immunity of public transit. Garbage collection at the White House has been by a private purveyor since the days of President John Adams. *History of Public Works* 433. In 1975, private firms collected residential refuse in 67% of 2,060 cities of all sizes surveyed, 61.4% of which relied entirely on private firms. E. Savas, *The Organization and Efficiency of Solid Waste Collection* 45, 63 (1977). "Waste disposal is one of today's hot new glamour industries . . . [which] has become a $10 billion business . . . ." Blyskal, *Glittering, Glamorous Garbage*, Forbes, June 8, 1981 at 156. *See also History of Public Works* 400 ("[m]ost of the early sewers were built with private capital"; "[r]emoval and disposition of sanitary waste was regarded as a private responsibility"; "private contractors cleaned cesspools and privies").

Data about parks and recreation also support SAMTA's position. According to a 1965 survey, 85,000 commercial enterprises provided outdoor recreational opportunities on 23 million acres, 46,000 more provided outdoor recreation facilities related to amusement and spectator sports on 18 million acres, and one million nonprofit enterprises were provided by 47,000 private and quasi-private nonprofit organizations on 7 million acres. *History of Public Works* 553, 554. *See also Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 159 n.8 (1978) (recreational parks are not an "exclusively public function"). Golf courses had their genesis in the private sector as private clubs, 10 Encyclopaedia Brittanica *Golf* 500-01 (1947), and in 1981 only about 15% of all golf courses in the United States were municipal, *Statistical Abstract* tab. 400, at 235.[32]

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[32] The Government's decision to exempt other activities not mentioned in *National League* reinforces SAMTA's position. For example, museums, although an important part of our cultural heritage, are not essential to the continued vitality of our urban areas. In 1975, 56% of the country's museums were run by private, nonprofit organizations, 34% were government run and 10% were governed by educational institutions. Nat'l Research Center of the Arts, Inc., Nat'l Endowment for the Arts, *Museums USA: A Survey Report* 13 (1975). The Government also ruled that a home for the retarded is exempt

4. A recurring, but disingenuous, theme of the Government's brief (pp. 20, 36 n.29, 46, 47, 48 n.37) is that transit can be distinguished from the activities exempted in *National League* because Congress extended the FLSA to public transit to prevent unfair competition with the private sector. On page 20 of its brief the Government has quoted an incomplete and misleading excerpt from the House and Senate reports. The full text of the quoted paragraph shows that Congress was also addressing unfair competition by public hospitals and schools:

> In addition to the amendment to section 3(s) of the act, section 3(r), which defines "enterprise," is amended to make plain the intent to bring under the coverage of the act employees of hospitals and related institutions, schools for physically or mentally handicapped or gifted children, or institutions of higher education, whether or not any of these hospitals, schools, or institutions are public or private or operated for profit or not for profit. Section 3(r) of the act is further amended to cover employees of street, surburban or interurban electric railways, or local trolley or motorbus carriers, if the rates and services of these railways or carriers are subject to regulation by a State or local agency, regardless of whether or not such railways or carriers are public or private or operated for profit or not for profit. These enterprises which are not proprietary that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises

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from the FLSA under *National League* (Opinion WH:492, Feb. 1, 1979, *reprinted in* Wage & Hour Manual (BNA) 91:1137-38) because it was owned by the county government, was operated by a board of commissioners appointed by the Police Jury, was established by an act of the state legislature, was considered a political subdivision of state government, and had the power to issue bonds and purchase land. These same factors apply to SAMTA, which was established by an act of the Texas legislature and is a political subdivision of the state, art. 1118x § 6(a); is operated by a board of trustees appointed by elected officials of cities in its service area and commissioners of Bexar County, *id.* § 6B; and can purchase land and issue bonds, *id.* §§ 6(d) & 7.

> will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which "constitute an unfair method of competition in commerce."

S. Rep. No. 1487, 89th Cong., 2d Sess. 8, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3002, 3010. Interestingly, in its brief on the merits in *National League*, the Government argued that state activities besides schools and hospitals compete with the private sector and pointed to "trash collection agencies," "recreation facilities, libraries, and the like . . .," *id.* at 20, and in its brief in *Maryland* v. *Wirtz*, (pp. 13-14), the Government cited the very same House Report it now cites (No. 1366) in support of its argument that public hospitals and schools were properly brought under the FLSA to eliminate unfair competition.

In actuality, there is no competition in the transit field. Unlike hospitals, garbage collection companies and recreational facilities, mass transit does not and cannot operate profitably.

5. The Government (brief at p. 48 n.37) attempts to distinguish transit from the *National League* activities on the ground that transit receives user fees. The Government even maintains that sanitation, education and parks do not receive such fees. The Government is wrong in its analysis. User charges as a percent of total costs in 1980-81 in the nation's 46 largest cities, were 43% for sewage, 40% for hospitals, 19% for institutions of higher education, and 16% for parks and recreation. Bureau of Census, U.S. Dep't of Commerce, *City Government Finances in 1980-81* tab. 8, at 98 (1981).[33] As noted earlier, SAMTA's fare box receipts represent less than 25% of operating costs. Furthermore, public facilities such as golf courses and garbage collection routinely charge user fees. Federal law even requires that federally funded sewage treatment plants adopt user charges that permit break-even financing. 33 U.S.C. § 1284(b)(1)(A) (Supp. V 1981).

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[33] These percentages were calculated by dividing total expenditures for each service into total revenues for each service.

D. FEDERAL FUNDING OF TRANSIT IS IRRELEVANT.

The Government and Garcia both challenge *National League* immunity on the ground that UMTA funds allegedly hastened the public takeover of transit systems. This contention draws absolutely no support from *National League* or *LIRR*, it is invalidated by this Court's decision in *Jackson Transit Authority* v. *Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982), and it constitutes a convoluted attempt to apply Spending Power arguments in a Commerce Clause case.

Initially, it should be noted that neither the City of San Antonio nor SAMTA received one cent of federal assistance in acquiring the local transit operations in San Antonio. The City bought the San Antonio Transit Company's assets in 1959, five years *before* federal grants were available. SAMTA acquired the equipment and facilities of the city-owned system in 1978 through the issuance of bonds payable only out of local revenues – not out of federally provided funds.

More importantly, this Court's decision in *Jackson Transit* forecloses appellants' federal funding argument. In that case, a unanimous Court rejected a transit union's claim that by providing UMTA funds Congress intended to regulate transit labor relations. The Court specifically held that "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers." *Id.* at 27. Certainly receipt of those very same funds cannot abrogate the Tenth Amendment rights of those same governmental entities, particularly since nothing in UMTA requires compliance with the FLSA.

Section 13(c) of UMTA (49 U.S.C. § 1609(c) (1976)), relied on by the Government (brief p. 45) and Garcia (brief p. 17), underscores the irrelevancy of federal aid to transit. Section 13(c) requires that as a condition of federal assistance, "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests of employees affected

by such assistance" and that the terms and conditions of the assurances be specified in the contract granting UMTA assistance.[34] Nothing in the 13(c) assurances between SAMTA and the Government (R. 514-527) obligates SAMTA to pay FLSA overtime to its workers. Rather, they require only that the rights, privileges and benefits of SAMTA's employees under the existing working conditions and practices and policies be preserved and continued. R. 515. They also state (*id.*) that "[u]nless otherwise provided, nothing in these arrangements shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the working conditions." Section 9(d) of UMTA (49 U.S.C. § 1608(d)(Supp. V 1981) prohibits use of UMTA provisions to "regulate in any manner the mode of operation of any mass transportation system" receiving a section 1602 grant except to require compliance with "undertakings furnished . . . in connection with the application for the grant." Since nothing in UMTA or the 13(c) assurances requires FLSA overtime, and they in fact bar other federal interference in SAMTA's operations, appellants cannot rely upon UMTA to compel compliance with the FLSA. *See Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").[35]

In arguing that UMTA grants affect transit's *National League* immunity, the Government is really making a Spend-

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[34] Federal funding laws in areas exempted by the Court contain similar provisions conditioning assistance on "fair and equitable arrangements . . . to protect the interests of employees": Juvenile Justice & Delinquency Prevention Act of 1974, 42 U.S.C. § 5633(a)(18) (Supp. V 1981); Public Health Service Act (as amended in 1979), 42 U.S.C. § 300t-12(c)(1)(Supp. V 1981); Developmentally Disabled Assistance & Bill of Rights Act, 42 U.S.C. § 6063(b)(7)(B) (Supp. V 1981).

[35] Whether UMTA could have constitutionally required FLSA coverage is not an issue in this case. The point is that neither UMTA nor SAMTA's 13(c) assurances undertook to require compliance with the FLSA.

ing Power argument in a Commerce Clause case. This difference was explicitly recognized in *National League*. 426 U.S. at 852 n.17. The Court obviously did not consider federal funding relevant since the dissent pointed out that during fiscal 1977 the President's proposed budget recommended $60.5 billion in assistance to the States, including $716 million for law enforcement assistance. *Id.* at 878.

The irrelevancy of federal aid to transit is also evident from a comparison of the substantial federal assistance to other exempt *National League* activities. Although the Government (brief pp. 34-35) has focused only on education and police protection in analyzing the role of federal aid to the States, it is undisputed that the federal government has underwritten other *National League* activities as much if not more than transit.[36] For example, between 1973 and 1981, $33.3 billion was appropriated for wastewater treatment plant construction. *Municipal Wastewater Treatment Construction Grants Program: Hearings on S. 975 & S. 1274 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment & Public Works*, 97th Cong., 1st Sess. 7, 16 (1981). This is almost double the $18 billion in federal aid to transit which Garcia (brief p. 20) claims has been made in the twenty years since UMTA was passed. Furthermore, the federal government pays up to 85% of capital costs for sewage treatment plants, many of which probably would not have been built without federal funds. 33 U.S.C. § 1282(a) (Supp. V 1981). In 1982 alone, the federal government contributed $54.6 billion (40.3%) of total hospital expenditures in the United States. Gibson, *National Health Expenditures 1982*, 5 Health

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[36] The Government (brief pp. 7, 32) and Garcia (brief p. 3) both place great reliance on the testimony of the general manager of SAMTA's predecessor when he appeared before Congress and requested more federal funding of transit. Similar statements were made at congressional hearings by state and local officials about sewage treatment. *E.g., Federal Pollution Control Act Amendments of 1977: Hearings Before the Subcomm. on Environmental Pollution of the Comm. on Environment & Pub. Works*, 95th Cong., 1st Sess. 124-30 (1977). The archives are undoubtedly filled with similar pleas for federal aid for virtually any state activity Congress has chosen to fund.

Care Financing Rev. 1, 9 (1983). State and local governments contributed only 12.8% of the total. *Id.* at 9. In 1982, federal aid to transit comprised only 4% of the $88.2 billion grants-in-aid given to state and local governments. Office of Mgmt. & Budget, Exec. Office of the President, *Special Analyses, Budget of the United States Government Fiscal Year 1984* tab. H-11, at pp. H-29, H-34 (1983). During the same period, 4% of federal grants were for sewage treatment plant construction, *id.* at H-28, 8% were for education, *id.* at H-30, and 20% were for health, *id.* at H-31.[37]

Even if federal funds had been used in the acquisition of the transit system in San Antonio, SAMTA's entitlement to Tenth Amendment protection would not be affected. Local government's use of federal funds to acquire transit opeations as a necessary step to ensure continuation of an essential local service is not materially different from federal subsidization of other local government activities which are exempt under *National League* and which would be curtailed or eliminated without federal aid. An activity specifically exempted in *National League*, which was essentially created as a result of federal funding, is solid waste management (sanitation). According to Office of Solid Waste Mgmt. Programs, EPA, *State Activities in Solid Waste Management, 1974* at iii (1975),

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[37] During fiscal 1980 (the last year for which such data could be found), of the more than $445 million in federal grants made to local governments and private entities and individuals in Bexar County, approximately $6.4 million were construction grants for wastewater treatment works, $44.6 million were for education, $96.8 million were for health and human services, $9.5 million were UMTA grants, and $15.8 million were for revenue sharing. Community Serv. Admin., *Geographic Distribution of Federal Funds in Texas* 17-20 (1980). In fiscal 1982, federal aid to Texas and its political subdivisions was $3.73 billion. Div. of Gov't Accounts & Reports, Fiscal Service—Bureau of Gov't Fin. Operations, Dep't of the Treasury, *Federal Aid to States Fiscal Year 1982* at 1 (1983). This sum included approximately $190 million for elementary and secondary education, *id.* at 8; $173 million for construction of wastewater treatment works, *id.* at 10; $682 million for medical assistance, *id.* at 11; $8 million for law enforcement assistance, *id.* at 17; $78 million for UMTA assistance, *id.* at 21; and $233 million in general revenue sharing, *id.* at 21.

"[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the Solid Waste Disposal Act of 1965." See also discussion, *supra*, regarding the role of federal funds in the development of hospitals.

II. TRANSIT IS ALSO EXEMPT UNDER *NATIONAL LEAGUE* BECAUSE IT IS AN INTEGRAL COMPONENT OF THE TRADITIONAL STATE ACTIVITY OF PROVIDING AND MAINTAINING STREETS AND HIGHWAYS FOR PUBLIC TRANSPORTATION

This Court's holding in *National League* granted FLSA immunity to "integral operations in *areas* of traditional governmental functions." 426 U.S. at 852 (emphasis added). In view of the language used by the Court in setting the parameters of its decision, it would appear that transit is immune from the FLSA under the Tenth Amendment if it is integral to a traditional state function. As shown below, transit is an essential component of the traditional state activity of providing and maintaining streets and highways for public transportation.

It is undisputed even under an historical standard that road building and maintenance for public transportation is a traditional activity of the States. As this Court noted in *South Carolina State Highway Department* v. *Barnwell Brothers, Inc.*, 303 U.S. 177 (1938):

> Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. . . . *Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions.* The state has a primary and immediate concern in their safe and economical administration.

Id. at 187 (emphasis added).[38] *See also Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir.

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[38] Since there is no history of the States' building, owning and maintaining railroad tracks and rights-of-way, railroads cannot be properly classified as an integral component of the street and highway transportation system.

1982) ("governments have built and maintained roads from time immemorial"); *Peel* v. *Florida Department of Transportation*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment.").

Over the years, the States' role as road builder and owner has evolved to meet the changing needs of the populace, and as a consequence the States have adopted comprehensive transportation plans that encompass not only road building and maintenance, but mass transit as well. For example, article 6663c(1)(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) decrees that "[p]ublic transportation is an essential component of the State's transportation system . . . ." In 1975, article 6663b merged the Texas Mass Transportation Commission into the State Department of Highways and Public Transportation. *See also* article 1118x, § 1(c) ("concentration of motor vehicles places an undue burden on existing streets, freeways and other traffic ways, resulting in serious vehicular traffic congestion"). Senator Harrison A. Williams, in introducing a bill to amend UMTA in 1969, eloquently underscored the role of transit as a component part of road building: "If it is a public responsibility to build highways for those who can afford a car, then surely we have even a greater obligation to make sure that public transportation is available to those without cars." 115 Cong. Rec. 3433 (1969). *See also Molina-Estrada*, *supra*, in which the First Circuit lumped all of the highway department's activities together—including road building and repairing, operating toll roads and parking lots, and building a transit system—in concluding "that the Authority is responsible for 'traditional' or 'integral' governmental activities." 680 F.2d at 845. These authorities demonstrate that the district court was eminently correct in concluding that "[m]ass transit is an integral component of a state's transportation system." Gov't J.S. 5a.[39]

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[39] Also instructive are the many cases that have found other nonrailroad instrumentalities of transportation to be essential functions. *E.g.*, *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961) (parking building

III. THE FLSA CANNOT BE APPLIED TO ANY STATE OR LOCAL GOVERNMENT EMPLOYEES ABSENT A CONSTITUTIONALLY VALID AMENDMENT[40]

A. If this Court allows application of the FLSA amendments only to public employees not excluded by *National League*, it will be engaging in judicial reformulation of the FLSA to add words of limitation (codifying the Court's "traditional governmental function" holding) where none presently exist. Although the FLSA has a severability clause (29 U.S.C. § 219 (1976)), the decisions of this Court show that such a clause does not permit a court to add words to a statute in order to make it constitutional.

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operated by state-created parking authority "was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions' "); *Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979) (municipal airport); *United States* v. *State Road Dep't of Florida*, 255 F.2d 516, 518 (5th Cir. 1958) ("it must be conceded that the building and maintenance of a system of state roads is essentially a governmental function. It being further conceded that this ferry is an integral part of the state road system . . ."); *Fowler* v. *California Toll-Bridge Auth.*, 128 F.2d 549, 551 (9th Cir. 1942) (Toll Bridge Authority "is representing and assisting the State in the performance of a traditional governmental function, that of building, operating and maintaining bridges and highway crossings as a part of the government system of state highways"); *People ex rel. Gutknecht* v. *Chicago Regional Port Dist.*, 123 N.E.2d 92, 99 (Ill. 1954) ("There is in principle no essential difference, so far as the public interest and the public safety are concerned, between the operation of a public airport and that of a highway, subway, wharf, public park, and the like.")

[40] This question was pled and briefed in the proceeding below, but the district court did not pass on its merits. The Court may consider the issue since "an appeal under 28 U.S.C. § 1252 . . . brings the 'whole case' before the Court." *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975); *accord*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977). SAMTA and APTA listed this as one of the questions presented in their motions to affirm, and appellants therefore should have presented any arguments they wish to bring before the Court on this point in their main briefs. *See* R. Stern & E. Gressman, *Supreme Court Practice* 704 (5th ed. 1978). Since they did not, they should be foreclosed from addressing it in their reply briefs. Alternatively, appellees should be given an opportunity to respond to the reply briefs on this point.

Hill v. *Wallace*, 259 U.S. 44 (1922) involved a severability clause virtually indistinguishable from the one in the FLSA. The Court held that the clause "did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain [since] [t]his is legislative work beyond the power and function of the court." *Id.* at 70. The Court relied on and quoted from *United States* v. *Reese*, 92 U.S. 214 (1876) in which Chief Justice Waite said:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. . . ."

259 U.S. at 70-71 (emphasis added). The Court also stated:

> To be sure in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. *But it does not give the court power to amend the act.*

Id. at 71 (emphasis added).

In order to bring virtually all states and local governments under the FLSA in 1974, Congress amended section 203(d) to include a "public agency" within the definition of "employer" and added section 203(x) to define public agency as meaning, among other things, "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." In order to make these definitions constitutionally valid under *National League*, a court would have to reframe the definition to add words of limitation such as, "to the extent they are not performing integral operations in areas of traditional governmental functions." Under

the rationale of *Hill* v. *Wallace*, a court cannot do this notwithstanding the presence of a severability clause. This Court's recent ruling in *INS* v. *Chadha*, 103 S. Ct. 2764, 2774-76 (1983) does not affect this result since that case did not involve use of a severability clause to add rather than delete provisions.[41]

B. Application of the FLSA only to nontraditional functions is also constitutionally unsound for a second reason. Congress intended to extend FLSA coverage to virtually all public employees. However, the necessary result of *National League* is to remove the great majority of public employees from the FLSA. Thus the very limited application of the FLSA permitted by *National League* would create a program different from the one Congress believed it was adopting. *See Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973) (severability clause does not permit a court to apply educational reimbursement statute to nonsectarian schools since it could not be constitutionally applied to sectarian schools; "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted"). The FLSA sets up no dichotomy between traditional and nontraditional governmental functions, and

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[41] The 1966 FLSA amendments apply only to public transit systems whose "rates and services are subject to regulation by a state or local agency . . . ." The plain meaning of this provision must be that only public systems that are regulated by some other state or local agency are covered. If public transit systems that regulated their own rates and services were included, the limitation in the 1966 amendments would have no meaning since all public systems would be covered. That SAMTA's interpretation is correct is indicated by the fact that in 1971, a bill was introduced to amend the FLSA to "apply to public transit systems whether or not their rates and services are subject to regulation by a state or local agency." *Hearings on H.R. 7130 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 206 (1971) (statement of C. Cochran, for Am. Transit Ass'n). Since SAMTA regulates its own services, *see* article 1118x §§ 6, 12, 13, and therefore is not embraced by the 1966 amendments, the only way FLSA coverage can be extended to its operations is through the 1974 amendments' inclusion of "public agenc[ies]."

therefore to reframe the statute to incorporate such a distinction would create a program different from the one Congress actually adopted. *See also Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975).

Chadha does not require a different result. Congress relied on this Court's decision in *Maryland* v. *Wirtz* when it extended the FLSA to the entire public sector, and it presumably did not intend to enact a program covering only a small number of public employees. *See* H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 6-7, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2816-17; *see also* 118 Cong. Rec. 24,240, 24,749 (1972).

CONCLUSION

SAMTA respectfully submits that the judgment of the district court is manifestly correct and should be affirmed.

Respectfully submitted,

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APPENDIX

1. Article 1118x, Texas Revised Civil Statutes Annotated (Vernon Supp. 1982-83) Provides In Part:

Section 1. The legislature finds that:

(a) A dominant part of the state's population is located in its rapidly expanding metropolitan areas which generally cross the boundary lines of local jurisdictions and often extend into two or more counties;

(b) The concentration of population in such areas is accompanied by a corresponding concentration of motor vehicles which are generally powered by internal combustion engines that emit pollutants into the air, which emissions result in increasing dangers to the public health and welfare, including damage to and deterioration of property as well as harm to persons, and hazards to air and ground transportation;

(c) Such concentration of motor vehicles places an undue burden on existing streets, freeways and other traffic ways, resulting in serious vehicular traffic congestion that retards mobility of persons and property and adversely affects the health and welfare of the citizens and the economic life of the areas;

(d) The proliferation of the use of motor vehicles for passenger transportation in such areas is caused in substantial part by the absence or inefficiency and high cost of mass transit services available to the citizens of such areas, and it is in the public interest to encourage and provide for efficient and economical local mass rapid transit systems in such areas for the benefit and convenience of the people and for the purpose of improving the quality of the ambient air therein and reducing vehicular traffic congestion; and

(e) The inalienable right of all natural persons to use the air for natural purposes does not vest in any person the right to pollute the air by artificial means, but such artificial use is subject to regulation and control by the state.

* * * * *

Sec. 3. (a) The governing body of a principal city in a metropolitan area may, on its own motion, shall, as provided in Subsection (b) of this section, and shall, upon

being presented with a petition so requesting signed by not less than 5,000 qualified voters residing within such metropolitan area, institute proceedings to create a rapid transit authority in the manner prescribed in this section.

* * * * *

Sec. 5. (a) After the original board is organized, at such time as it deems implementation of the authority to be feasible, it shall call a confirmation and tax election in accordance with the provisions of this section.

* * * * *

Sec. 6. (a) The authority, when created and confirmed, shall constitute a public body corporate and politic, exercising public and essential governmental functions, having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act, incuding, but not limited to, the following powers granted in this section.

* * * * *

(e) The authority shall have the power to acquire, construct, complete, develop, own, operate and maintain a system or systems within its boundaries, and both within and without the boundaries of incorporated cities, towns and villages and political subdivisions, and for such purposes shall have the right to use the streets, alleys, roads, highways and other public ways and to relocate, raise, reroute, change the grade of, and alter the construction of, any street, alley, highway, road, railroad, electric lines and facilities, telegraph and telephone properties and facilities, pipelines and facilities, conduits and facilities, and other properties, whether publicly or privately owned, as necessary or useful in the construction, reconstruction, repair, maintenance and operation of the system, or to cause each and all of said things to be done at the authority's sole expense. . . .

* * * * *

(g) The authority shall have the right of eminent domain . . . .

* * * * *

(n) The authority shall by resolution make all rules and regulations governing the use, operation and maintenance of the system and shall determine all routings and change the same whenever it is deemed advisable by the authority.

* * * * *

(p) The acquisition of any land or interest therein pursuant to this Act, the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection, and policing of the authority's system and facilities, and the exercise of any other powers herein granted an authority, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity.

* * * * *

Sec. 6C. (a) The acquisition of any land or interest in land pursuant to this Act; the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection, and policing of the authority's system and facilities; and the exercise of any other powers granted an authority, including without limitation the rights, powers, and authority relating to station or terminal complexes as provided in this section, are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity for public use and public benefit.

* * * * *

Sec. 7. (a) The authority shall have no power to assess, levy or collect any ad valorem taxes on property, nor to issue any bonds or notes secured by ad valorem tax revenues. The authority, however, shall have the full power to issue bonds and notes, from time to time and in such amounts as it shall consider necessary or appropriate, for the acquisition, purchase, construction, reconstruction, repair, equipping, improvement or extension of such rapid transit system or systems and all properties thereof whether real, personal or mixed. . . .

* * * * *

Sec. 8. (a) Subject to approval at an election, the board of an authority shall be authorized to levy and cause to be collected motor vehicle emission taxes as herein provided. . . .

* * * * *

Sec. 11A. (a) In addition to or in lieu of the motor vehicle emission taxes provided for in this Act, the board of an authority may levy and collect any kind of tax, other than an ad valorem tax on property, which is not prohibited by the Texas Constitution.

* * * * *

Sec. 11B. (A) Subject to approval at a tax election in accordance with this Act, the board of an authority shall be authorized to levy, collect and impose a local sales and use tax for the benefit of the authority, the sales tax portion of which shall not exceed one percent on receipts from the sale of all taxable items within the authority area which are subject to taxation under the provisions of the Limited Sales, Excise and Use Tax Act, as enacted and as heretofore or hereafter amended. . . .

* * * * *

Sec. 12. The responsibility for the management, operation and control of the properties belonging to an authority shall be vested in its board. The board may:

(a) employ all persons, firms, partnerships or corporations deemed necessary by the board for the conduct of the affairs of the authority, including, but not limited to, a general manager, bookkeepers, auditors, engineers, attorneys, financial advisers and operating or management companies, and prescribe the duties, tenure and compensation of each. . . .

* * * * *

Sec. 13. The board may adopt and enforce reasonable rules and regulations:

(a) to secure and maintain safety and efficiency in the operation and maintenance of its facilities;

(b) governing the use of the authority's facilities and services by the public and the payment of fares, tolls and charges;

(c) regulating privileges on any land, easement, right-of-way, rolling stock or other property owned or controlled by the authority; and

(d) regulating the collection and payment of emission taxes levied by the board.

* * * * *

Sec. 13A. Any authority established hereunder shall be within the definition of "unit of government" as defined by the Texas Tort Claims Act, as amended (Article 6252-19, Vernon's Texas Civil Statutes), and all operations of an authority are deemed to be essential governmental functions and not proprietary functions for all purposes, including the application of the Texas Tort Claims Act.

2. Article 6663b, Texas Revised Civil Statutes Annotated (Vernon 1977) Provides In Pertinent Part:

Section 1. (a) The State Department of Highways and Public Transportation:

(1) may purchase, construct, lease, and contract for public transportation systems in the state;

(2) shall encourage, foster, and assist in the development of public and mass transportation, both intracity and intercity, in this state;

(3) shall encourage the establishment of rapid transit and other transportation media;

(4) shall develop and maintain a comprehensive master plan for public and mass transportation development in this state;

(5) shall assist any political subdivision of the state in procuring aid offered by the federal government for the purpose of establishing or maintaining public and mass transportation systems;

* * * * *

Sec. 2. On the effective date of this Act, all programs, contracts, assets, and personnel of the Texas Mass Transportation Commission are transferred to the State Department of Highways and Public Transportation. The comptroller of public accounts and the State Board of Control shall assist in the orderly implementation of this transfer.

3. Article 6663c, Texas Revised Civil Statutes Annotated (Vernon 1977) Provides In Pertinent Part:

Section 1. (a) The legislature finds that:

(1) transportation is the lifeblood of an urbanized society, and the health and welfare of that society depend on the provision of efficient, economical, and convenient transportation within and between urban areas;

(2) public transportation is an essential component of the state's transportation system;

* * * * *

(b) The purposes of this Act are to provide:

(1) improved public transportation for the state through local governments acting as agents and instrumentalities of the state;

(2) state assistance to local governments and their instrumentalities in financing public transportation systems to be operated by local governments as determined by local needs; and

(3) coordinated direction by a single state agency of both highway development and public transportation improvement.

4. The Fair Labor Standards Act Of 1938, 29 U.S.C. § 201 *et seq.* (1976) Provides In Part:

29 U.S.C. § 203:

As used in this chapter—

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States

(including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

* * * * *

29 U.S.C. § 219:

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

5. The Urban Mass Transportation Act Of 1964, 49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) Provides In Part:

49 U.S.C. § 1601b:

The Congress finds that—

(1) over 70 per centum of the Nation's population lives in urban areas;

(2) transportation is the lifeblood of an urbanized society and the health and welfare of that society depends upon the provision of efficient economical and convenient transportation within and between its urban areas;

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons;

(6) some urban areas are now engaged in developing preliminary plans for, or are actually carrying out, comprehensive projects to revitalize their mass transportation operations; and

(7) immediate substantial Federal assistance is needed to enable many mass transportation systems to continue to provide vital service.

* * * * *

49 U.S.C. § 1608(d):

None of the provisions of this chapter shall be construed to authorize the Secretary to regulate in any manner the mode of operation of any mass transportation system with respect to which a grant is made under section 1602 of this title or, after such grant is made, to regulate the rates, fares, tolls, rentals, or other charges fixed or prescribed for such system by any local public or private transit agency; but nothing in this subsection shall prevent the Secretary from taking such actions as may be necessary to require compliance by the agency or agencies involved with any undertakings furnished by such agency or agencies in connection with the application for the grant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, *Appellant*
V.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL., *Appellee*

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *Appellant*
V.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL., *Appellee*

On Appeal From The United States District Court
For The Western District Of Texas

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA SUPPORTING AFFIRMANCE

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NO. 82-1913
NO. 82-1951

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOE G. GARCIA, Appellant
V.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, Appellant
V.
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation designated as a public interest law firm under regulations of the Internal Revenue Service. It is located on the campus of the South Texas Law School in Houston and has particular expertise in matters of economic policy, public policy, and constitutional law. LFA does not accept private fees but is supported by the law school and by private contributions. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

LFA has long had an interest in cases involving the federal-state balance. It has appeared as amicus curiae in such cases in this honorable Supreme Court, in the federal courts of appeal and district courts, and in the courts of the several states. It has

supported the exercise of federal authority in some cases, including authority over interstate commerce, national defense, and civil rights enforcement. In some cases, it has supported the interests of state or local governments. It has provided legal representation to states, bar associations, local government units, and other governmental entities in some such cases, as well as appearing in its own name.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision in Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979), provides an objective test for distinguishing "integral" or "traditional" state functions. The Amersbach test accurately reflects existing decisions. It is consistent with longstanding concepts of economics and political science, identifies those state functions in which recognition of sovereignty is most important, and is the only such test that has achieved wide acceptance. The purpose of this brief is to suggest the appropriateness of the Amersbach test as a means of resolving the case at bar and as a means of preserving consistency in this area of constitutional law.

ARGUMENT

THE TEST OF AMERSBACH V. CITY OF CLEVELAND, 598 F.2d 1033 (6th Cir. 1979), IS THE MOST APPROPRIATE MEANS FOR DISCERNING "INTEGRAL" OR "TRADITIONAL" STATE FUNCTIONS.

In Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979), the court set out a test for "integral" or "traditional" state functions, as follows:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider

> of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community wide need for the service or activity.

The court deduced this test by "analyzing the services and activities which the [Supreme] Court characterized [in National League of Cities] as typical of those performed by governments." Id.

This Amersbach test has since been widely accepted, and it is submitted that it is an appropriate means for resolving the issue at hand.

A. The Amersbach test accurately reflects existing decisions distinguishing functions that are "integral" or "traditional" from those that are not.

The Amersbach test provides objective criteria for distinguishing fire, police, sanitation, or hospital activities (which have been held to be within the rule of National League of Cities)[1] from activities, such as selling bottled water or producing oil and gas, which have not.[2] Amersbach accurately reflects these existing categorizations because it was based on a careful analysis of precisely those categorizations.

B. The Amersbach test is consistent with long-standing, generally accepted concepts of economics and political science.

An economist or political scientist would immediately recognize the concept embodied in the Amersbach test. In nontechnical terms, the Amersbach criteria describe what these scholars would call a "public good." Harvard economist Robert

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1 National League of Cities v. Usery, 426 U.S. 833, 851-52 (1976).

2 New York v. United States, 326 U.S. 572 (1946); Public Service Co. v. FERC, 587 F.2d 716 (5th Cir. 1979).

Dorfman describes public goods as "Goods that cannot be assigned to individual consumers or firms. The welfares of several (or all) consumers or firms are affected jointly by the total amount of public goods in the community." [3] Former Professor (now Circuit Judge) Richard Posner provides a similar definition, stressing that the good cannot be accurately priced in market terms because its use by anyone benefits the community as a whole. [4] Examples of "important" public enterprises given by Economist Richard Caves include the following: ". . . the postal service, water and sewer services, [and] *local transportation* . . . ." [5]

In this connection, it should be added that the Amersbach test provides a complete answer to the argument of Appellant Garcia, whose brief raises the spectre of a "state take-over from the private sector of the provision of goods and services" if States can operate government enterprises "free of the federally-imposed costs." [6] Public goods are precisely those that *cannot* be

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3 R. DORFMAN, PRICES AND MARKETS 195 (3d ed. 1978).

4 R. POSNER, ECONOMIC ANALYSIS OF LAW 351 (2d ed. 1977).

5 R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT AND PERFORMANCE 113 (5th ed. 1982).

6 Brief of Appellant Garcia at 13. There are several reasons why Garcia's arguments are unpersuasive. In the first place, Garcia assumes government would use "eminent domain." Id. But to do so, it would be required to pay full compensation at market rates. That payment is usually impractical (and was difficult for local governments even in the transit situation). Secondly, the efficiency losses attributable to substituting political decisionmaking for market information are substantial and would make such "takeovers" impractical. R. DORFMAN, supra note 5, at 174. Finally, Garcia's argument that there would be a "powerful incentive" for such "takeovers" ignores the reality that covered government services involve losses, not profits, requiring large taxpayer subsidies.

In fact, application of regulations designed for the private sector indiscriminately to subsidized government services has the economic effect of decreasing the ability of government to provide those services at the proper level in a mixed economy. See part D of this brief, below.

efficiently provided by private enterprise, and hence the Garcia argument is ill-considered.

Amicus curiae recognizes that the concepts of economics and political science cannot always be read directly into the law. However, the congruence of the Amersbach test with traditional scholarly criteria for recognizing "integral" governmental functions, and its ability to avoid completely the issues raised by Appellants, is an indication of its soundness.

C. The Amersbach test is the only approach that has gained widespread acceptance among courts considering the problem at issue.

The Amersbach test has been repeatedly cited by both district and appellate courts in several circuits. These courts have found that Amersbach provides an accurate, objective means for solving the problem at hand. [7]

D. The Amersbach test identifies those functions in which States most need recognition of their sovereignty.

A state may not need recognition of its sovereignty in matters such as sale of bottled water or oil and gas production. But governmental services that are provided to the public at large subsidies, requiring that all members of the public be served without regard to the difficulty of such service, at all hours and on holidays, and in spite of emergencies, require the state to function with some breathing space for its sovereign capacity. In terms of Appellant Garcia's economic arguments, the Amersbach test accurately and reliably identifies governmental services of this

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7 E.g., Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841 (1st Cir. 1982) (authority planning mass transit system held an integral state function, following Amersbach); Woods v. Homes & Structures of Pittsburg, Kansas, Inc., 489 F. Supp. 1296 (D. Kan. 1980) (private development bonds held not an integral state function, following Amersbach).

nature. A transit, fire, or police service, for example, cannot take its necessary place in the provision of goods and services if it is subjected to regulation suited to the private market, making it more difficult for it to operate during the "graveyard" shift. [8]

CONCLUSION

The Amersbach test affords a reliable, realistic, and consistent means for recognizing protected governmental services. It is congruent with traditional scholarship, has been accepted by both trial and appellate courts facing diverse federalism issues, and identifies precisely those services for which state sovereignty most requires recognition.

Under the Amersbach test, local public transit is a clearly protected government service. The opinion of the district court in this regard is well reasoned and should be affirmed. [9]

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8 Government enterprise in these areas cannot operate as efficiently, because it is deprived of the informational input of the market and must rely instead on political choices. R. DORFMAN, supra note 5, at 174.

9 Public transit benefits the community as a whole by eliminating pollution, alleviating congestion, conserving energy, and stimulating economic development. It cannot be priced at its true cost to each rider (because then, the rational driver would take his car more cheaply, leaving it to others to take transit and alleviate congestion—a formula for failure of transit). Riders therefore pay only a small fraction of the true cost. It is clear that government does not operate transit for pecuniary gain, but rather for public service and community wide benefit. 557 F. Supp. at 453.

Finally, government is particularly well suited for the purpose. It provides most local public transit. As the district court pointed out, 557 F. Supp. 454, counting the number of transit services is misleading. In 1978, governmentally operated public transit accounted for 91 per cent of vehicle miles, 91 per cent of linked passenger trips, 90 per cent of mass transit revenues, and 87 per cent of transit vehicles.

Thus the Amersbach test strongly supports the conclusion that governmentally provided mass transit is an "integral" function of state and local government. 557 F. Supp. 454.

Respectfully submitted,

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IN THE

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Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeals from the United States District Court for the Western District of Texas

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BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether publicly owned mass transit systems—which serve citizens' vital need for transportation and are crucial to modern cities—are a "traditional" governmental function which is protected against intrusive federal action by the Tenth Amendment.

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INTEREST OF THE AMICI CURIAE

The *amici* are organizations whose members include state, county, and municipal governments and officials located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The question presented in this case, whether the wage and hour provisions of the Fair Labor Standards Act (FLSA), apply to municipal mass transit systems, is of paramount importance to *amici*. For urban mass transit is an essential public service forming a chief pillar of urban infrastructure, and cannot succeed as a private sector commercial enterprise in urban areas. New demographic and technological circumstances have forced state and local governments into playing the dominant role in providing this essential public service.

Moreover, the issues in this case are not only critical to urban mass transit, but are of profound consequence for the authority and functions of state and local jurisdictions. For these reasons, *amici* are submitting this brief to assist the Court in its consideration of the questions presented in this litigation.[1]

STATEMENT OF THE CASE

A. Relevant Facts[2]

Amici agree with the statement of facts set forth in the brief of appellee American Public Transit Association. In addition, *amici* wish to emphasize several facts which demonstrate the critical importance of this case for state and local governments. The emphasized facts relate both to the San Antonio mass transit system and to mass transit systems in general.

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] References to the Record are noted as R. ——.

1. *Mass Transit Services Are Predominantly Provided by Publicly Owned Systems.*

Publicly owned transit systems provide the vast bulk of mass transit services in the United States today. In 1980, local publicly owned systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. American Public Transit Association, *Transit Fact Book*, 27, 43 (1981) (hereafter referred to as *Fact Book*). Moreover, mass transit is principally provided by local governments in 100 of 106 cities with a population greater than 200,000. Urban Mass Transportation Administration, U.S. Department of Transportation, *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas of Over 50,000 Population* (1979) (hereafter referred to as *DOT Directory*), R. 453-59.

2. *Publicly Owned Mass Transit Serves Vital Needs.*

The services that public transit systems provide are vital to the functioning of urban society. Without these systems, tens of millions of citizens would have no access to jobs, schools, hospitals, parks and recreation areas, or business and shopping districts. For example, more than 80 percent of the employees who work in central business districts in large metropolitan areas such as Chicago and New York City commute to work on public transit, *Fact Book*, *supra*, at 24, and at least two out of three passengers of the San Antonio bus system are engaged in going to or from school or a job. Affidavit of Wayne M. Cook, General Manager, San Antonio Metropolitan Transit Authority ¶ 14 (hereafter referred to as *Cook Affidavit*), R. 202.

Public mass transit systems are also critical for business development in urban areas: businesses take account of these systems in determining whether and where to locate in metropolitan areas. In San Francisco, for example, two-thirds of the businesses polled listed proximity to mass transit as an important factor in deciding

where to locate. *Fact Book, supra*, at 22. Similarly, it is estimated that the Washington D.C. subway system will stimulate $6 billion of private development by the time it is completed. *Id.*

In addition, without these publicly-owned transit systems, our nation's cities would be gridlocked by increased traffic congestion and would suffer greatly increased pollution caused by additional automobile emissions.[3]

3. *Publicly Owned Mass Transit Systems Are Particularly Necessary for the Disadvantaged, and Provide Extra Services for Special Classes of Riders.*

As is true of other governmental functions such as parks, recreation facilities and police and fire protection, anyone can use public transit services. However, the need for and use of public mass transit is particularly acute for minorities, handicapped persons, the elderly, and others who are economically disadvantaged. Thus, a survey conducted for the San Antonio Metropolitan Transit Authority (SAMTA) indicates that rush hour transit ridership is comprised of 66 percent Mexican-American or Spanish-speaking persons and 14 percent Blacks, and that 84 percent of the riders have incomes below $15,000. During nonrush hour, 88 percent of the transit riders are minority and 91 percent have annual incomes below $15,000. *Cook Affidavit, supra*, at ¶ 13, R. 202.

These percentages are not unique to the San Antonio transit system. Thus, in a mass transit case from Macon,

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[3] The Chicago Transit Authority estimates that, without public mass transit in that city, 100 miles of additional six-lane expressways and six times the parking area presently available in the downtown business district would be necessary to accommodate the increased automobile traffic. *Fact Book, supra*, at 21. Further, the American Public Transit Association calculates that, if all mass transit trips from 1970 to 1980 had been made by automobiles, America's cities would have been polluted by an additional 138,000 tons of hydrocarbons, an additional 1,360,000 tons of carbon monoxide, an additional 327,000 tons of nitrogen oxides, and an additional 46,000 tons of particulate matter. *Id.* at 37-38.

Georgia presently pending on this Court's docket, the lower court found that 94 percent of the riders of the city's publicly owned transit system are "transit captive"—live in a household having no automobile—and that 89 percent of the riders are Black, 80 percent are middle-aged, 80 percent have low incomes, and 66 percent are women. *Alewine v. City Council*, 699 F.2d 1060, 1064 (11th Cir. 1983), petition for certiorari filed sub nom. *City of Macon v. Joiner*, No. 82-1974, 51 U.S.L.W. 3884.

San Antonio, like many of its urban counterparts throughout the country, also provides extra, beneficial public services to special classes of transit riders. For example, the elderly and the handicapped ride the transit system at substantially reduced rates, bus service for shoppers in the central business district is free, and the immobile handicapped, totally dependent on transit services, are provided with special van service which picks them up at their doors and delivers them to their destinations. *Cook Affidavit, supra*, at ¶¶ 9-12, R. 200.01. Other transit systems aid handicapped riders by providing buses equipped with mechanical kneeling devices for easy boarding. Urban Mass Transportation Administration, U.S. Department of Transportation, *Financing Transit: Alternatives for Local Government* (report prepared for the Department of Transportation by the Institute of Public Administration) (hereafter referred to as *Financing Transit*) 261 (1971).

4. *Mass Transit Has Long Been Regulated By State and Local Governments.*

Because it is a critical part of the infrastructure of urban areas, mass transit has long been the subject of extensive regulation by state and local governments. See, *San Antonio Metropolitan Transit Association v. Donovan*, 557 F. Supp. 445, 447-48 (W.D. Tex. 1983). Historically, local governments have regulated fees, routes, schedules, franchises, and safety, even though the transit systems were privately owned. *Id.* at 448. For example, as far

back as 1913, Texas cities received exclusive authority from the state legislature to regulate fares and operations of vehicles used for carriage for hire. 1913 Tex. Gen. Laws, Ch. 147, § 4, at 714, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175, §§ 20, 21 (Vernon 1963). Conversely, the federal government historically has *not* regulated local mass transit systems.

5. *Changing Conditions Made Mass Transit Unprofitable for Private Enterprise, Thus Forcing Local Governments to Provide This Vital Service.*

In the 1950's and 1960's, there was a shift in population from the cities to the suburbs, fueled in part by federal programs such as the Interstate Highway Act of 1956 and low cost housing loans of the Veterans Administration and Federal Housing Administration. See generally, *Financing Transit*, *supra*, at 3-7. An unintended consequence of these federal initiatives was a major increase in the cost of providing mass transit to an ever-expanding metropolitan area. Mass transit systems were no longer profitable and private companies began to go out of business. The situation spelled disaster for millions of citizens, particularly the "transit captive": the poor, the elderly, the handicapped and minority groups, all of whom rely on mass transit for accessibility to essential human services.

To ensure provision of these vital transport services, necessary to maintain the viability of the city itself, local governments had to go beyond regulation, and had to take over ownership of mass transit systems. See *Financing Transit*, *supra*, at 14-16. Thus, in 1959 the City of San Antonio purchased the San Antonio Transit Company and provided mass transit as a municipal service. *Cook Affidavit*, *supra*, at ¶ 2, R. 197. San Antonio, like several major American cities before it, acquired the transit company without the aid of federal funds.[4]

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[4] Seattle did the same in 1911, San Francisco in 1912, Detroit in 1921 and New York City in 1932. *See*, Affidavit of Stanley G. Feinsod, Executive Director, Policy and Programs, American Pub-

However, in response to requests from state and local governments and other entities, Congress later realized that federal assistance would be necessary to help local governments acquire transit facilities and assure the maintenance of vital municipal transport services. In 1964, therefore, Congress enacted the Urban Mass Transportation Act (UMTA). 49 U.S.C. §§ 1601 *et seq.* (1976 and Supp. V 1981).

Thereafter, mass transit systems quickly became a publicly owned function to an overwhelming degree. By 1978, 91 percent of the riders, 91 percent of the vehicle miles, 90 percent of the revenues and 87 percent of the vehicles were accounted for by publicly owned systems. *Feinsod Affidavit, supra*, at ¶ 4, R. 176. The full burden of providing essential transport services thus fell upon local governments and their publicly owned entities. The private companies simply left the business wholesale; they provided neither aid to nor competition for the public systems. The public systems were left to shoulder the entire responsibility themselves.

6. *Publicly Owned Mass Transit Systems Are Governed and Financed In the Same Way As Other Public Services Provided by Local Governments.*

After acquiring facilities from private transit systems, local governments administered them in the same way as other basic public services such as schools, parks, and hospitals. In San Antonio, for example, SAMTA is governed by a board of trustees appointed by the San Antonio City Council, the Bexar County Commissioners, and the mayors of the incorporated cities served by the system. *Cook Affidavit, supra*, at ¶ 3, R. 197. This ap-

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lic Transit Association (hereafter *Feinsod Affidavit*), at ¶ 4, R. 176. By the time the federal government began providing funds to aid local governments in purchasing mass transit systems, over half the residents of cities with a population of or exceeding 250,000 were served by publicly owned transit. See Appellee American Public Transit Association's Motion to Affirm at 11, *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

pointed board regulates all of SAMTA's operations. SAMTA itself is a political subdivision of the state of Texas and its creation had to be approved in an election. *Id.* at ¶¶ 2-3, R. 196-197. Moreover, as an instrument of state government, SAMTA has authority to levy and collect taxes, issue bonds, and bring eminent domain proceedings. *Id.* at ¶ 3, R. 197. The key administrative decisions necessary to operate SAMTA are thus made by state and local government officials.

Also, local governments extensively finance transit systems in the same way they finance other basic public services such as police and fire protection, maintenance of park and recreation areas, and public health services. Financing methods used to subsidize public transit systems include general revenue, property, *ad valorem*, mortgage, parking, sales, cigarette, and earnings taxes, lottery proceeds, and bridge tolls. *Feinsod Affidavit, supra* at ¶ 8A, R. 178. See generally, *Financing Transit, supra.*

These financing mechanisms are necessary to subsidize public transit systems, which operate at a loss. For example, during SAMTA's first two fiscal years, it had an operating budget of $41.6 million, while total revenue from fares was only $10.1 million. A permanent sales tax levy of ½ of 1 percent, which the voters approved to subsidize SAMTA, provided an essential $26.8 million during these first two years to help satisfy the system's $31.5 million operational deficit. *Cook Affidavit, supra,* at ¶ 2, ¶ 6, R. 196, 198.

7. *Mass Transit Workers Are Paid Fairly.*

Despite heavy operational losses, public transit operators are paid fairly, especially in comparison to other public and private workers. Available figures show that the wages of transit operators have exceeded those of other full-time city employees and those of workers in the manufacturing and construction industries. In addition, transit wages rose by a greater percentage than the

wages of manufacturing workers and by approximately the same percentage as the wages of construction workers during the period 1950-1977.[5] Department of Labor statistics also demonstrate that transit wages are competitive with the wages of workers in the printing trades and with the earnings of truck drivers and their helpers. See, *e.g.*, Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States*, Table Nos. 708, 709 (1980).

As these facts make clear, the wages of transit workers are far above the minimum hourly wages prescribed by the FLSA—the standard appellants seek to impose in this case. A 1981 government survey indicates the median hourly wage for transit operating employees was $9.01 per hour, nearly triple the then prevailing minimum wage. U.S. Department of Labor, *Union Wages and Benefits: Local Transit Operating Employees*, Table 2 at 4 (1981).

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[5] The following chart, printed in *Financing Transit* at 11, compares the earnings of transit workers, full-time city employees, and manufacturing and construction workers during 1950-1976.

COMPARATIVE TRENDS IN TRANSIT AND OTHER WAGES 1950-1977

	Amount		Percent Increase in Wages in Constant-Value Dollars
	1950	1977	
Transit, average annual wage	$3,479	$14,885	70%
Manufacturing, annualized weekly rate [a]	2,916	11,445	56
City employees [b]	3,084	13,008	68
Contract construction	3,484	14,783	71

[a] Average weekly wages multiplied by 50. This procedure overstates annual wages in manufacturing and construction, both of which, but particularly construction, are more subject to seasonal fluctuations than is transit, where employment is fairly steady.

[b] Computed average compensation for full-time employees for October multiplied by 12.

The competitive wages paid to transit workers are safeguarded by a very strategic bargaining position—vast dependence of citizens on public transit systems. A work stoppage by transit employees could cripple a city and has to be avoided if at all possible. This fact gives transit workers tremendous leverage in collective bargaining. The wages of transit workers therefore continue to rise despite cutbacks in federal financial assistance to state and local governments and lean budgets for vital public services at all levels of government.

Another major factor in the competitive wages of transit workers is that transit systems have to schedule employees' work in split shifts in order to cover peak commuter hours in the morning and evening, and the systems therefore provide "spread premium compensation" to employees who work split shifts. See Chomitz and Lave, *Forecasting the Financial Effects of Work Rule Changes*, 37 Transp. Q. 453 (1983). This factor also demonstrates the need for operational flexibility, which would be seriously impaired if the FLSA were to apply. A split shift schedule, and its effects on wages, can be exemplified as follows:

A transit employee will work a morning shift and an evening shift during peak commuter hours, with a mid-afternoon break during off-peak hours. Each shift can be four hours, with the break being four hours. Thus the workday may be spread over twelve hours, but only eight of them would involve working time.

Transit employees receive a premium rate of pay because of the spread of the workday. Thus after ten hours have elapsed, six of which have been spent working and four of which have been off-hours, the employee will receive premium compensation for the remaining two hours that he or she works.[6] Over a normal five-day work week, the employee would receive regular compen-

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[6] The level of such premium compensation varies. It can range up to one and one half times the normal rate of pay.

sation for 30 hours and premium compensation for 10 hours. Transit systems would thus compensate employees at a premium rate for one quarter of their normal work.

Imposing FLSA requirements, however, would require public transit systems to pay their employees even greater sums of money. The precise level of the increase would vary with the interrelationship of specific employment circumstances and complex FLSA requirements. But the end result would be a substantial increase in the overall wage costs of public mass transit, which is labor-intensive and already has to be heavily subsidized because it loses large amounts of money. See Chomitz and Lave, *supra*, at 456-463. The FLSA concomitantly would decrease public transit systems' flexibility to schedule work hours in a fair way that meets citizens' need for transportation without incurring prohibitive costs. Moreover, imposition of the wage and hour provisions of the FLSA could have undesirable effects on the provision of other public services by local governments, since budget priorities may have to be adjusted to make up for the increased costs of transit services.

B. The Decision Below

The Court below held mass transit is protected by the Tenth Amendment because it is a traditional governmental function. The Court found there is a long record of state concern with mass transit. 557 F. Supp. at 448. It pointed out that this concern initially was expressed through extensive state and local regulation, but now local governments have become the primary provider of mass transit services. *Id.* at 448-449, 452-453, 453-454. To rule mass transit is not a traditional governmental function, held the Court, would represent "the static historical view of state functions" eschewed by this Court in *United Transportation Union v. Long Island R. R. Co.*, 455 U.S. 678 (1982). *Id.* at 450. Nor did the Court find any principled distinction between mass transit and

other state and local activities which have received large federal grants but which this Court held to be traditional governmental functions in *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976). *Id.* at 451.

The Court also recognized that mass transit benefits the community as a whole, is operated at a large loss which is primarily subsidized by state and local taxes, and, because it is unprofitable, can only be supplied by government. *Id.* at 453. Finally, the Court ruled that federal regulatory responsibility would not be eroded by declaring mass transit to be a state or local governmental function. *Id.* at 448-450. Rather, both the states and Congress have recognized that public transportation is an essential function of state and local governments. *Id.* at 451.

SUMMARY OF ARGUMENT

1. This Court has previously used a three-pronged test for determining whether a state or local activity is protected against intrusive federal action by the Tenth Amendment. Under the third prong, the activity must be a "traditional governmental function." This prong, the Court has said, "was not meant to impose a static historical view of state functions." *United Transportation Union v. Long Island R.R. Co., supra*, 455 U.S. at 686. Thus, it cannot and does not require that a function be identical to a prior activity of state or local governments. Rather, it requires only that an activity be of the same genre or type as prior ones. An activity *is* of the same genre or type if it serves the same purposes or policies as prior activities.

Were the third prong to require more—were it to require that an activity be identical to prior ones—the concept of traditional governmental function would be statically frozen as of a prior date in history, and state and local governments would be unprotected when they alter their activities to meet the changing needs of citizens.

The provision of mass transit *is* a type of function traditionally performed by state and local governments. Publicly owned mass transit systems are a vital part of the local transportation infrastructure, for which local governments have always taken significant responsibility. Publicly owned systems came into existence because private companies could no longer supply essential services needed by tens of millions of citizens, particularly the less affluent, minorities, the young and the elderly. The public systems now supply over 90 percent of all mass transit service, and have very little or no competition from private mass transit companies. Publicly owned systems help to further other traditional governmental functions, and are intended solely to serve the public good rather than to make a profit.

Furthermore, because mass transit is an activity in which local governments have now been extensively engaged for at least twenty years, it not only is a *type* of function traditionally performed by local governments, it *is* a function traditionally performed by them.

2. Appellants are incorrect in asserting that mass transit is not a traditional governmental function because "primacy" must be given to history under *LIRR*. *LIRR* specifically rejected a static historical test. But that is precisely the test appellants seek to impose here. For they ignore the history of the last twenty years, during which mass transit overwhelmingly became a governmental function rather than a private one.

Moreover, *LIRR* was quite different from this case in critical respects. In *LIRR* the service at issue, commuter railroads, was overwhelmingly provided by private companies at the time of suit. Here the service at issue is overwhelmingly provided by publicly owned systems. A'so, in *LIRR* the Court was concerned that century-old federal regulation of general railway matters and railway labor relations would be eroded, with disastrous effects upon the national economy. Here regulation

has been by state and local governments, not the federal government, and there is no danger of harm to the national economy.

3. Application of the FLSA would gravely harm significant interests of local governments. The already high costs and losses they incur in providing mass transit would be increased, and their ability to develop innovative and flexible working schedules necessitated by commuting patterns would be stifled. Harms such as these were a major reason this Court refused to countenance imposition of the FLSA in *National League of Cities v. Usery, supra.*

On the other side, there will be no impairment of federal interests if the FLSA is not applied to transit operators. The operators already receive competitive wages, have fair working hours, and possess a strategic bargaining position that ensures such wages and hours.

4. Finally, appellants are incorrect in claiming that publicly owned mass transit systems should not qualify for Tenth Amendment protection because local governments used UMTA funds in acquiring and operating transit systems.

First, this Court has ruled that if Congress intends to impose conditions upon receipt of federal grants, it must do so unambiguously, so that state and local governments will know the obligations they are assuming and can judge whether they nonetheless wish to accept the grants. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The UMTA, however, does not condition its grant monies upon compliance with the wage and hour provisions of the FLSA. Indeed, when it passed the UMTA, Congress eschewed creating a body of federal labor law applicable to relations between local governments and transit operators. Moreover, San Antonio acquired its transit system even before passage of the UMTA and without federal funds.

Second, and of even greater importance, appellants' argument will gravely impair the federal nature of our system. As the federal government commonly does, appellants are relying on federal funding to justify displacement of state and local authority on a subject vital to state and local governments. But such position will vitiate federalism because the ability of the federal government to raise money through taxation and borrowing is far superior to that of state and local governments. Due to its superior financial power, the federal government grants over $80 billion annually to state and local entities. The grants are necessary to enable state and local governments to effectively carry out such essential sovereign functions as health, education, safety, police protection and roadbuilding, and are essential both to meet operating costs and to acquire vital capital facilities. Without the grants, state and local governments would be gravely hampered in performing their sovereign duties effectively.

Thus, if grants enable the federal government to displace state and local authority, then national power will be aggrandized and state and local power will be diminished across a broad range of critical state and local activities. This result undermines the constitutional plan of federalism, under which power is divided among levels of government. Huge federal grants did not deter the Court from precluding federal intrusion upon areas of state and local decisionmaking in *National League of Cities*, *supra*, and such intrusion should not be allowed here either.

ARGUMENT

I. Publicly Owned Mass Transit Systems Are A Traditional Governmental Function

A. Introduction

In prior cases this Court has said a three-pronged test must be satisfied before a state or local activity is protected by the Tenth Amendment. See, *e.g.*, *Hodel v. Vir-*

ginia Surface Mining and Reclamation Assn., Inc., 452 U.S. 264 (1981). The three prongs are that (1) challenged federal action must regulate the states *qua* states, (2) the federal action must affect a matter which is an indisputable attribute of state sovereignty and (3) the federal action must "directly impair the states' ability to structure integral operations in areas of traditional governmental functions." *Id.* at 287-288.

In addition, the Court has said that even if each of these prongs is met, the state or local interest may still have to submit to federal power if the federal interest is strong enough.

Finally, in explaining the third prong of the foregoing test—the "traditional governmental function" prong—the Court has emphasized that the purpose of this prong is to determine whether the ability of states to fulfill their role in the Union is being impaired. *United Transportation Union v. Long Island Railroad Company*, *supra*, 455 U.S. at 686, 687.

Amici, who represent the governors, state legislators, cities and counties of this nation, have grave reservations as to whether the three-pronged test provides satisfactory criteria for determining whether state and local power is protected under the Tenth Amendment.[7] However, it is

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[7] The test inherently creates serious intellectual and practical difficulties, and it seems to be extraordinarily hard for state and local power to survive under it. See, *e.g.*, *Equal Employment Opportunity Commission v. Wyoming*, —— U.S. ——, 103 S. Ct. 1054 (1983); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island R.R. Co.*, *supra*; *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*; *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Kramer v. Newcastle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, —— U.S. ——, 103 S. Ct. 786 (1983); *Alewine v. City Council*, *supra*. The test thus results in progressive and vast centralization of power in the federal government, with a concomitant and serious diminution in the governing power of state and local governments. Such centralization and diminution is a result eschewed by the constitutional

unnecessary to deal with this question here. For even if the three-pronged test is applied, publicly owned mass transit systems qualify for immunity from federal wage and hour regulation. In this regard, it is crucial to note that the first two prongs of the test are not even at issue here. Rather, all parties have conceded these two prongs are met: it is conceded that the challenged federal wage and hour regulation is here being applied to states as states and addresses a matter—the wages and hours of government employees—which is an indisputable attribute of state sovereignty.

Concession on these points is well founded. For in *National League of Cities, supra*, this Court already conclusively determined that application of the FLSA to the states and their political subdivisions is a regulation of the "States as States." 426 U.S. at 845. Equally, the Court determined that the "States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation

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plan of federalism, under which power is to be shared among levels of government.

Because of *amici's* views on this subject, *amici* have and will continue to point out specific weaknesses in each of the three prongs as appropriate cases arise in this Court. See, *e.g.*, *Brief Of The Council of State Governments, The National Conference of State Legislatures, The National Association of Counties, The National League of Cities, The International City Management Association, and The United States Conference of Mayors as Amici Curiae In Support Of a Plenary Hearing and Reversal of the Decision Below, State of Connecticut et al. v. United States of America, et al.*, No. 83-870, O.T. 1983. *Amici* will further urge that a better criterion of state and local power under the Tenth Amendment is whether challenged federal action harms the ability of state and local governments to fulfill their role in the Union. This criterion, of course, was initially presented by the Court in *LIRR, supra*. *Amici* will also urge that an additional criterion of state and local power is whether the state and local interest is heavily outweighed by the federal interest because of constitutional or practical reasons. Here again, the advocated measure of power was initially presented by this Court, this time in *Hodel, supra*.

will be provided where these employees may be called upon to work overtime," are "undoubted attribute[s] of state sovereignty." *Ibid.*

Thus, the only question in this case under the three-pronged test is whether publicly owned mass transit is a traditional governmental function, a question we address below. Additional questions are whether imposition of the FLSA will harm the ability of local governments to effectively carry out their role in the Union, and whether the federal interest in applying the FLSA here is so strong that it necessitates submission of the local governments' interests. These questions, too, are addressed below.

B. Publicly Owned Mass Transit Systems Are a Type of Function Historically Performed By Local Government

1. In *LIRR*, *supra*, this Court ruled that "emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions." 455 U.S. at 686. Rather, the purpose was to determine whether a federal regulation will hinder a state "government's ability to fulfill its role in the Union," or will "undermine the role of the states." *Id.* at 686, 687.

Because the traditional governmental function test does not impose a "static historical view," it cannot and does not require that a function be identical to a prior activity of state and local governments. Rather, it demands only that an activity be of the same genre or type as those previously performed by such governments. An activity *is* of the same genre or type if it serves the same purposes and policies as prior activities.

Were the test to require more than this—were it to require identity of activities—the concept of traditional governmental function would be static and frozen as of a prior date in history. To the vast detriment of themselves

and their citizens, state and local governments would be unprotected against intrusive federal action if they altered their activities or adopted new methods and techniques to meet the changing needs of citizens. Though technology, demographics, economic facts and other relevant factors were altered, the protected functions of state and local governments could not change. The effectiveness of the governing power of state and local governments would progressively diminish, and the power of the federal government would progressively increase. Contrary to our constitutional plan of federalism, power would ever-increasingly be centralized in the national government.

None of this is an idle or academic problem. Rather, the problem is a crucial one. For state and local governments have often had to begin providing new services needed by citizens because of changes in technological, demographic and economic facts. Over time such new services have already included public schools, hospitals, fire departments, sanitation facilities, mass transit, airports, and other necessities of modern life. And there can be no telling what new services might be required in the future.

If they are to fulfill their constitutional and governmental roles, state and local governments must be free to perform new activities and adopt new methods as circumstances require, free of debilitating federal action. We thus reiterate our central point: The traditional governmental function test does not require that a state or local activity be identical to prior ones. At most, it demands only that an activity be of the same genre or type as ones previously performed by state or local governments.

2. The provision of mass transit *is* of a genre traditionally performed by state and local governments. Traditionally, these governments have provided citizens with essential infrastructure public services which cannot be or are not being provided by private enterprise, *e.g.*, police and fire protection, roads, and sewage treatment

plants. Indeed, there are essential services which this Court has acknowledged to be traditional governmental functions even though they are provided by private enterprise as well as by government, *e.g.*, schools and health facilities. *National League of Cities, supra*, at 851. Also, as this Court expressly took pains to point out just last term in *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, —— U.S. ——, 103 S.Ct. 1011, 1047 n.7 (1983), the provision of services required by the needy "is a traditional concern of state and local governments."

Under these criteria, mass transit is the type of function historically performed by local governments. Local mass transit systems are a vital infrastructure service. Publicly owned systems came into existence because private companies could no longer provide this essential service, but its continuation was crucial to vast numbers of citizens and to the economic and environmental health of urban areas. The extent of the total transit service provided by publicly owned systems quickly grew to overwhelming proportions—to far greater proportions than the service provided by acknowledged traditional governmental functions such as publicly owned hospitals and universities. Because they provide an overwhelming percentage of the service, publicly owned transit systems have no competition from private companies in most areas and very little in others.[8] And publicly owned

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[8] The Department of Transportation directory of urban transit systems lists SAMTA's only competition as two vehicles belonging to Trailways, Inc. *DOT Directory, supra* at 8, R. 457.

In his brief, appellant Garcia argues that holding mass transit to be a traditional governmental function will give such transit an advantage that will stifle competition in transit services and will encourage governments to take over other businesses. The argument is contrary to facts, highly speculative, and simply wrong.

In the mass transit field there is very little if any competition from private companies. See generally, *DOT Directory, supra*. Indeed, publicly owned transit arose precisely because private companies no longer wished to be in the field. Nor will a decision favorable to publicly owned mass transit encourage governments to

mass transit systems predominantly serve the needs of less affluent and otherwise needy members of society. For these reasons, publicly owned mass transit is a paradigm of the type of activity traditionally engaged in by state and local governments.

Indeed, it is appropriate to go further. Because mass transit is an activity in which local governments have now been heavily engaged for at least twenty years, it not only is the *type* of activity traditionally performed by these governments, it *is* an activity traditionally performed by them.[9]

3. There are several additional reasons why publicly owned mass transit carries out longstanding purposes and policies of local governments, and at minimum is the type of function traditionally performed by them:

a. Because they are crucially concerned with ensuring an adequate local transportation infrastructure, state and local governments have facilitiated the public's need for transportation "from time immemorial." See *Molina Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir. 1982). Prior to owning mass transit systems, these governments aided the transportation infrastructure by building and maintaining roads. This previously was a sufficient involvement, but such a limited role is no longer practical. For private transit com-

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take over businesses which are largely and satisfactorily private. Not only is there a complete absence of data to suggest such a result, but factors which now make mass transit a governmental function would not exist in such cases. Finally, as shown by the existence of private schools, private hospitals, private garbage collectors, and even private fire departments, when a field is one in which economic and technological conditions make it intrinsically possible to earn a profit, private companies can exist and thrive even though government bears responsibility for providing a basic service.

[9] Indeed, a number of large and small cities have been heavily engaged in providing mass transit services for much longer than the last twenty years. And more recently, of course, mass transit has been not just heavily but overwhelmingly provided by local governments.

panies have gone out of business as metropolitan areas expanded and costs skyrocketed. Nor can enough highways be built to carry people in private automobiles. There is insufficient land for such construction, to say nothing of funds. Moreover, even if enough new roads could be developed, they would be of little benefit to the "transit-captive," who lack access to private cars. Thus, public mass transit is the only feasible alternative for many American citizens. It is essential to the existence of the modern city, and enables a local government to meet the public's basic transportation needs.

b. Mass transit also furthers other traditional governmental functions. For example, many of SAMTA's riders are persons for whom the government would have to provide substitute services if there were no public transit system. Millions of riders in 1978 and 1979 were students of the Bexar County and Fr. Sam Houston Independent School Districts on their way to school. *Cook Affidavit, supra*, at ¶ 8, R. 199. If there were no public transit system, these school districts would have to hire additional drivers and buses to provide transportation. Another large class of riders is the elderly, *id.* at ¶ 9, R. 200, who have limited mobility. If it had no mass transit system, San Antonio would have to provide them with meals on wheels programs when food shopping becomes too difficult and medicab programs when transportation to doctors and public health centers becomes otherwise unavailable.

The substitute services which San Antonio would have to provide for school children and the elderly would be traditional governmental functions under the local government's power to provide schools and to promote the public health and welfare. Since it serves the same purposes and policies as such traditional functions, a centralized public mass transit system serving the city's school, health and welfare goals, as well as other governmental goals, should itself be considered a traditional governmental function.

Finally, most peak hour riders are commuting to and from work. There is a strong governmental interest in making it possible for members of the work force to get to their places of employment. This interest is kin to the longstanding state and local interest in promoting local employment and the local economy by such measures as tax abatements to industry for locating in an area.

c. Publicly owned mass transit is intended to serve the public good, not pecuniary gain. Like other traditional governmental functions, and unlike private business, it is not a commercial enterprise and does not make money. Indeed, the federal government estimates that, by 1985, annual deficits for public mass transit could reach as high as $4.6 billion. *Financing Transit*, *supra*, at 19.

Rather than being a commercial enterprise, mass transit fills a public need that the private sector no longer can fill—universal transportation services at a low price. No one but SAMTA, for example, would provide the efficient, free El Centro downtown bus service for shoppers and office workers, as well as special services at greatly reduced fares for the elderly.

C. The Long Island Railroad Case Provides No Support for Appellants

Though provision of mass transit is the *type* of function traditionally performed by state and local entities, and at least during the last twenty years has *been* a function traditionally performed by local governments, appellants claim it cannot meet the traditional function test. Relying on *LIRR*, *supra*, they say that "primacy" must be given to history, *Brief for the Secretary of Labor*, p. 25, and that historically mass transit systems were owned by private companies.

LIRR does not support defendants, however. To begin with, it rejected a static historical test. But that is precisely the kind of test defendants seek to apply. For in seeking to give "primacy" to history, appellants overlook the history of the last twenty years, during which mass

transit became so overwhelmingly supplied by governments rather than private companies that by 1980 publicly owned systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. Unless history must be frozen as of the start of the Johnson administration in 1963, the historical record of the last two decades belies appellants' claim that the "primacy" of history demands judgment for them.[10]

The historical record of the last two decades also undercuts defendants' effort to find a factual similarity between this case and *LIRR*. For when it said in *LIRR* that "[o]peration of passenger railroads" such as the commuter line involved there "has traditionally been a function of private industry, not state or local governments," the Court immediately added the rather pertinent fact that "[a]t the time of this suit, there were 17 commuter railroads in the United States; only two of those railroads were publicly owned and operated, both by the Metropolitan Transportation Authority." *United Transportation Union v. Long Island R.R. Co.*, *supra*, 455 U.S. at 686, 686 n.12. A situation in which only 2 of 17 commuter lines were owned by a public entity is worlds apart from one in which public entities all across the nation now provide over 90 percent of the service.

Finally, there also is another highly important distinction between this case and *LIRR*. In *LIRR* the Court pointed out at length that railroads had been "subject to pervasive federal regulation" under the Interstate

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[10] Though the Secretary of Labor argues for the "primacy" of history, even he is forced to concede that a new technological development can create a protected governmental function. *Brief for the Secretary of Labor*, at 25. However, he denies that new economic or demographic developments can create the same status, at least not where a technology was initially employed by private enterprise. The Secretary's position lacks any sensible basis. As mass transit exemplifies, changes in demographic and economic facts can require government to undertake a function just as surely as technological change.

Commerce Act "for nearly a century," and that federal regulation of railroad labor relations had begun only one year after the Interstate Commerce Act was passed. *United Transportation Union v. Long Island R.R. Co.*, *supra*, 455 U.S. at 687-688. The Court felt this uniform and long-standing federal regulation of railway matters was essential to the rail system and the national economy, which could be greatly harmed by crippling rail strikes if federal law were inapplicable. Because of this view, the Court was greatly concerned lest there be nationally harmful erosion of the broad and historic federal regulatory authority over railroad operations in general and railway labor relations in particular. *Id.* at 688-689.

But no comparable situation exists here. There has been no pervasive overall federal regulation of mass transit—regulation of transit was instead supplied by state and local governments. As well, the federal effort to regulate the wages and hours of transit operators is only of recent vintage, as shown by appellants' own briefs, and is not critical to the health of the economy. Thus, there will be no improper erosion of federal regulation here nor any danger to the national economic system.[11]

II. Application of the FLSA to Publicly Owned Mass Transit Would Harm the Ability of Local Governments to Fulfill Their Role and Is Not Justified By Any Federal Interest

Application of the FLSA to publicly owned transit systems would harm the ability of local governments to fulfill their governmental role of providing mass transit services. Nor does the federal government have an interest in application of the FLSA that would outweigh, and

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[11] Any supposed danger to the national economy stemming from lack of federal control over transit operators is further belied because *National League of Cities* has already exempted far larger numbers of state and local employees from federal wage and hour regulation. Appellants have not and could not validly claim this harmed the national economy.

justify submission of, the local governments' interests. To the contrary, the interests of the local governments greatly outweigh the federal interest.

In *National League of Cities, supra*, this Court ruled that the FLSA could not be applied to the sovereign functions of state and local governments lest their ability to perform these functions be impaired. Under this holding, applicable here, the interest of the federal government in applying the FLSA is outweighed by the interest of state and local governments in connection with crucial state and local activities.

Beyond this, the imposition of the wage and hour provisions of the FLSA would dramatically increase the costs of labor-intensive mass transit. It would thereby increase the losses suffered by governmental entities in providing this service—a service which already is heavily subsidized because it already loses large amounts of money. The increased costs and losses would adversely affect the ability of governmental systems to adequately provide services essential to scores of millions of citizens. It is of great consequence that such potential for increased costs, and the consequent adverse effect upon necessary services, was an important reason why this Court struck down the federal government's attempt to impose the FLSA upon state and local activities in *National League of Cities, supra*, 426 U.S. at 846-48.

The FLSA would also impair the ability of transit systems to schedule work in a way that meets the needs of citizens. Because of rush-hour commuting patterns, public transit systems must develop innovative work schedules that balance the need for an efficient transportation system with the workers' right to fair wages and fair working hours. This is accomplished by split shifts, under which workers receive premium rates of pay because they have breaks between their operating hours.[12]

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[12] Split shift working schemes can also serve a secondary purpose of helping the public transit system include a variety of workers on

If the wage and hour provisions of the FLSA are imposed on mass transit services, local governments may have to abandon the split shift scheme, as the costs could become too high. Here again it is of great consequence that the possibility that innovative or flexible working schemes would be stifled was a major reason this Court struck down the application of the FLSA to state and local entities in *National League of Cities*. 426 U.S. at 850.

Moreover, the potential stifling of innovative or flexible schedules implicates another broad state and local interest, the interest in being free to experiment. This right is crucial to improving the efficiency of state services and its exercise is in the interest of the federal government as well as state and local governments. In the words of Justice Brandeis:

> There must be power in the states and the nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs.
>
> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also Zobel v. Williams*, 457 U.S. 55, ——, 102 S. Ct. 2309, 2321 (1982) (O'Connor, J., concurring); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980).

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the payroll: certain classes of workers may find it difficult to spend long uninterrupted stretches away from home or personal obligations.

As against these important local interests, there is little to balance on the federal side. The only federal interest expressed in the FLSA is a commendable desire to assure that workers receive at least the minimum wage and fair working hours. But public transit workers receive wages three times as high as the minimum prescribed by the FLSA, and their wages are comparable with those of other city employees, construction workers, manufacturing workers, and workers in the building and printing trades. As well, they are already paid premium rates for a significant portion of their normal working hours. The working hours themselves are arranged to provide fair hours while meeting the exigencies of transit service. Finally, unlike workers for whom the FLSA is basically designed, the employees of public mass transit systems occupy a strategic bargaining position which ensures them of fair wages and hours.[13]

Nor need there be any fear that holding the FLSA inapplicable to publicly owned mass transit will result in federal regulatory power being diminished in connection with subjects on which it should prevail. There will still be many subjects where, for constitutional and practical reasons, federal power will be sustained, whether it is applied to mass transit or other state and local activities. The Constitution, for example, forbids racial and religious discrimination. No state or local government can evade this prohibition on Tenth Amendment grounds. Similarly, acting pursuant to its constitutional powers, Congress can mandate state and local compliance with laws banning discrimination by age or sex. See, *Equal Employment Opportunity Commission v. Wyoming*, —— U.S. ——, 103 S. Ct. 1054 (1983). Also, because uniform national minimums are requisite to successful efforts to stop nationally harmful air and water pollution

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[13] As stated by this Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945), the FLSA was enacted because, due to "unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation" regarding minimum wages and maximum hours.

and nationally harmful wastes of energy, Congress can constitutionally require adherence to laws establishing minimum antipollution standards and preventing wastes of precious energy resources. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra*; *Federal Energy Regulatory Commission v. Mississippi, supra.* Thus, on these and other appropriate subjects, federal power will continue to be maintained.

III. Because of Important Constitutional Principles, Federal Funds Provided Under the UMTA Cannot Justify the Imposition of the FLSA Upon Publicly Owned Mass Transit Systems

Appellants urge that publicly owned mass transit systems should not qualify for Tenth Amendment protection because local governments used UMTA funds in acquiring or operating transit systems, and especially urge that the use of such funds to acquire systems should distinguish mass transit from other fields. Appellants' argument is erroneous for crucial constitutional reasons.

First, this Court has ruled that if Congress intends to impose conditions upon federal grants, it must state the conditions unambiguously, so that state and local governments will know the obligations they are assuming and can judge whether they nonetheless wish to accept the grants. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). This precept is violated by appellant's argument. The UMTA does not condition its grant monies upon compliance with the wage and hour provisions of the FLSA. To the contrary, in passing the UMTA "Congress made it absolutely clear that it did *not* intend to create a body of federal law applicable to labor relations between local government entities and transit workers." *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, —— *U.S.* ——, 102 S.Ct. 2202, 2209 (1982) (emphasis supplied).[14]

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[14] The only provision of the UMTA which had any effect at all on labor relations was Section 13(c), 49 U.S.C. § 1609(c), which con-

Moreover, San Antonio acquired its transit system without the use of UMTA monies and before that act was even passed.

Second, and of even greater importance, appellants' argument will gravely impair the federal nature of our system. In claiming that the wage and hour provisions of the FLSA are applicable to publicly owned transit systems because local governments have used UMTA funds, appellants are relying on federal funding to justify displacement of state and local authority on a subject vital to state and local governments. Such a position is commonly asserted by the national government,[15] but its argument will vitiate the federal system. For the national government has a financial power vastly superior to that of state and local governments: it has an infinitely greater ability to raise money through taxation and borrowing. Because of its superior financial power, the national government grants over $80 billion annually to state and local governments; such funds are important in enabling state and local governments to fully carry out their essential sovereign functions. The granted funds are used in such crucial fields as health, education, safety, police protection and roads. They are used both for operating costs and to acquire essential capital facilities—*e.g.*, roads, schools, hospitals and public buildings. Without the funds, state and local governments would be gravely hampered in performing their sovereign duties effectively. This is no less true in regard to funds used to acquire vital facilities than in regard to funds used to operate state and local functions.

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ditions federal grants upon recognition of employees' collective bargaining rights. The inclusion of this specific condition highlights the absence of any provision under which application of the FLSA is a condition of grant monies.

[15] See *e.g.*, *Brief for Appellees, State of Connecticut, et al. v. United States, et al.*, No. 83-6159 (2d Cir. 1983), jurisdictional statement pending, No. 83-870, O. T. 1983.

Thus, if the grant of funds enables the national government to establish governing conditions in areas the Constitution otherwise commits to state and local governments, then national power will be aggrandized and state and local authority will be diminished across a broad range of critical state and local activities. Instead of power being divided among levels of government, as the Constitution contemplates, it will be centralized in the national government, as the Constitution eschews.[16] Huge federal grants for such functions as police protection, health services and park restoration did not deter this Court from precluding federal intrusion into these areas of state and local decisionmaking in *National League of Cities, supra*. Likewise, the fact of federal grants should not sanction federal intrusion upon state and local decisionmaking in other areas which are constitutionally committed to state and local governments.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below that publicly owned mass transit systems are protected by the Tenth Amendment against application of the FLSA.

Respectfully submitted,

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[16] This will occur though federal grant monies, while crucial to the ability of state and local governments to fully carry out their functions, are nonetheless far below the amount of their own funds spent on vital functions by state and local governments. See, Madden, *The Constitutional Foundations of Federal Grants*, in *Federal Grant Law* 5, 6 n.3 (M. Mason, ed. 1982).

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Nos. 82-1913 and 82-1951

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IN THE

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OCTOBER TERM, 1983

JOE G. GARCIA,
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v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

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Appellees.

On Appeal from the United States District Court for the Western District of Texas

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REPLY BRIEF OF APPELLANT JOE G. GARCIA

ARGUMENT

I. THE TENTH AMENDMENT DOES NOT IMMUNIZE STATE-OWNED TRANSIT SYSTEMS FROM COMMERCE-CLAUSE REGULATION.

A. Appellees view *National League of Cities v. Usery*, 426 U.S. 833 (1976), as "conclusively decid[ing] that the power of the States to make wage and hour determinations is a function essential to their separate and inde-

pendent existence." San Antonio Metropolitan Transit Authority ("SAMTA") Br. at 15-16 n.10; *see* American Public Transit Association ("APTA") Br. at 13-14 n.14. And appellees contend that *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) ("*UTU*"), creates the narrowest of exceptions, limited to "the context of what was perhaps a unique function for a state to acquire, *i.e.* railroads," APTA Br. at 28, and justified only by "the[] perhaps unique, comprehensive, uniform federal regulation of railroads," *id.* at 29 n.39; *see also* SAMTA Br. at 17-18, 21-22. Thus, in the most literal sense, appellees view *UTU* as a "restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

Appellees' argument is flawed in two respects. First, appellees overread *National League of Cities*. If that case had "conclusively decided that the power of the States to make wage and hour determinations is a function essential to their separate and independent existence," its rule would admit of no exceptions and would preclude application of the Fair Labor Standards Act or like legislation to *any* and *all* state employees. But *National League of Cities* does not so hold; the Court expressly couched its holding in more limited terms:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8. [426 U.S. at 852]

Consistent with that holding, the Court in *UTU* determined that the operation of a railroad is not an "integral operation[] in [the] area[] of traditional governmental functions" and on that basis concluded that the federal government is empowered to regulate the wages and hours of state employees who operate state-owned railroads. *See* 455 U.S. at 684.

Second, in attempting to limit *UTU* to railroads, appellees focus on only one of the two discrete parts of the Court's analysis. The first part of that analysis—Part II of the opinion—does not rely on any consideration unique to railroads. Rather, the Court there reasoned that "'the running of a business enterprise is not an integral operation in the area of traditional government functions,'" *id.* at 685 n.11, *quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422-24 (1978) (Burger, C.J., concurring), especially where running such an enterprise "has traditionally been a function of private industry, not state or local governments," 455 U.S. at 686. The Court concluded that part of its opinion as follows:

> It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. *Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.* [*Id.*; second emphasis added]

Only after so concluding did the Court go on, in Part III of the *UTU* opinion, to discuss the railroad-specific factors appellees stress here such as that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century," *id.* at 687, and that Congress "has determined that a uniform regulatory scheme is necessary to the operation of the national rail system," *id.* at 688. The Court drew in essence the same lesson in Part III that was drawn in the concluding passage of Part II just quoted:

> The State knew of and accepted the federal regulation; moreover, it operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty. . . . It can thus hardly be maintained that application of the Act to the

> State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities v. Usery*, 426 U.S., at 851." [455 U.S. at 690]

Parts II and III of the *UTU* opinion, then, are independent of each other and establish two *alternative* grounds of decision. *Cf. Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

Part II announces the first rule of that case: where a State takes over the operation of a business enterprise that has traditionally been a part of the private sector, that enterprise does not become an "integral operation in the area of traditional government functions" immune from federal regulation of the wages and hours of the enterprise's employees. As the Court put it last Term in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, —— U.S. ——, 103 S.Ct. 1011, 1014 n.6 (1983), "It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause power when they are engaged in proprietary activities."

Part III of *UTU* announces a second rule: where a State undertakes an activity that has long been subject "to comprehensive federal regulation" and as to which "a uniform regulatory scheme is necessary," the Tenth Amendment does not preclude federal regulation of the wages and hours of the state employees engaged in that activity regardless of whether the activity is deemed proprietary or non-proprietary.

It is the first of these rules that is controlling here as we demonstrated at length in our opening brief.[1]

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[1] Appellees' response to our argument that stated-owned transit operations are "business enterprises" is that such operations are not "profit-making." APTA Br. at 18; *see* SAMTA Br. at 27-28 n.24. But as we explained in our opening brief (at 15), the same was true of the railroad in *UTU*, which was deemed by the Court to be a "business enterprise." *See also Helvering v. Leland Powers*, 293

B. Underlying appellees' attempt to expand *National League of Cities* and to constrict *UTU* is the thesis that as the States take over private-sector business enterprises, their Tenth Amendment immunity from federal regulation should continually expand and Congress' commerce power continually contract. As we noted in our opening brief (at 23-24), that view of the Tenth Amendment would turn the Amendment into an economic incentive for the public sector to assume functions previously performed by the private sector. Under appellees' theory, so long as a service is provided through the private sector, that service is subject to federal regulation—regulation that in order to further other social values may (and, as the FLSA illustrates, often does) raise the costs of delivering that service; if, however, the States elect to provide that very service themselves, federal regulatory power ceases, permitting the States to offer the service at a lower cost.

We know of no evidence that the founding fathers sought in this way to further, or even to ease, the transformation of a private enterprise system for the provision of goods and services (like the transportation of the individual citizen on his private rounds from one place to another) to a state enterprise system. Certainly appellees offer no reasoned defense of their thesis that by reason of some natural law (akin to that currently held on the evolution of the universe) the Tenth Amendment is ever-

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U.S. 214 (1934) (concluding that the State's operation of a transit system was a "business enterprise" even though the system had lost sizeable sums of money and received state subsidies for many years); *United States v. California*, 297 U.S. 175, 183 (1936) (sustaining federal power to regulate a state-owned railroad and expressly rejecting the argument that "as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceedings of operation for harbor improvement, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act").

expanding. Given the anomalies created by appellees' reading of the Tenth Amendment, their silence on the principle that justifies such a reading is pregnant with significance.

C. Appellees also place great stress on the importance of state-owned transit systems "to the life of any community," arguing that public transportation "is at least as important to the health and survival of a community as are the functions expressly protected in *National League of Cities*." APTA Br. at 16-17. But the commuter railroad at issue in *UTU* was no less important to New York than SAMTA is to San Antonio,[2] yet the Court concluded that the Long Island Rail Road is not an integral operation in an area of traditional governmental functions.

Indeed, were the rule otherwise, the Tenth Amendment would know no bounds. As this Court recognized in *Reeves Inc. v. Stake*, 447 U.S. 429 (1980), there is virtually no limit to the type of activities that "[a] State may deem . . . essential to its economy," *id.* at 442-43 n.16; even a state-run cement plant may "today be deemed indispensable," *id.* Thus, appellees's assertions of mass transit's importance do not justify clothing state-owned transit systems with the Tenth Amendment immunity that *National League of Cities* affords only to "integral operations in areas of traditional governmental functions."

D. Even if it would otherwise be appropriate to conclude that the States in entering a field previously occupied by private business enterprises acquire a Tenth-

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[2] As APTA stated in its *amicus curiae* brief in *UTU* (at 6):

> The primary and almost exclusive activity of the LIRR is provision of local public commuter transit service, a service that today is an activity typical of the services state and local governments have provided their citizens. *It is as essential and integral to the government's public responsibility in the community* it serves as are [the activities considered in *National League of Cities*]. [Emphasis added.]

Amendment immunity from federal regulation, that conclusion is altogether inappropriate with respect to mass transit because of the federal government's catalytic role in the States' entry into this field. Appellees attempt to dismiss the enactment and funding of the Urban Mass Transit Act in two ways, but those attempts do not have sufficient intellectual force to banish UMTA from this case.

Appellees first note that the federal government grants "substantial federal assistance" to the States to fund other activities as to which *National League of Cities* precludes federal regulation. SAMTA Br. at 43-44; APTA Br. at 39-40 n.61. But our point here has nothing to do with the mere fact of federal assistance to mass transit (although the percentage of such assistance is significantly higher for transit than for the other activities to which appellees point, *see* Secretary of Labor ("Sec'y") Br. at 34-35). Rather, what is critical is that when UMTA was enacted state-operated mass transit was rare and there was a recognized need for government *at some level* to enter the mass-transit field.[3]

The federal government could have responded to that need by itself acquiring and operating mass-transit systems; had this been done federal regulatory power would have been unlimited. (In the railroad industry the fed-

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[3] SAMTA attempts to minimize UMTA's effect by relying on the facts that circa 1965, over 50% of all transit riders patronized public transit and over 56% of transit employees worked for public transit systems. SAMTA Br. at 28. But those data are misleading, for most of the public transit riders and employees were accounted for by a few large cities such as New York; as of 1965 outside of the largest cities, state-owned transit operations were almost unheard of. *See* Hearings Before the Committee on Banking and Currency of the House of Representatives, 88th Cong., 1st Sess. at 313 (1963) (statement of George Anderson, Executive Vice President, American Transit Association); Lyle C. Fitch and Associates, *Urban Transportation and Public Policy* at 261 (1964). *See also* our opening brief at 15-16.

eral government in fact followed that course.[4]) Instead, Congress chose through UMTA to enter into cooperative endeavors with the States, recognizing the important federal interest in mass transit. *See* Sec'y Br. at 26-34. As a result, to quote again the Third Circuit's words in *Kramer v. New Castle Transit Authority*, 677 F.2d 308, 310 (3d Cir. 1982), *cert. denied*, —— U.S. ——:

——:

> The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important federal role in the matter. The Authority cannot recast this development as one in which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. . . . There is . . . no tradition of the states qua states providing mass transportation.[5]

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[4] *See* Rail Passenger Service Act, 45 U.S.C. §§ 501 *et seq.*

[5] We hasten to add that contrary to the assertion of appellees, it is *not* necessary to our position to conclude that "state and local governments provide transit services because federal aid enticed them into doing so" (APTA Br. at 36-37) or even that federal aid "hastened the public takeover of transit systems" (SAMTA Br. at 41). We do not think it necessary or profitable to speculate about the States' real motive or true purpose in entering the transit field, or about what would have occurred in the absence of UMTA. It is enough that the States chose to enter the mass transit field hand-in-hand with the federal government in cooperative endeavors.

Because this is so, § 13(c) of UMTA, 49 U.S.C. § 1609(c), is significant, for as a result of that section the labor relations of public transit systems have been subject to some federal regulation since the States entered the transit field; indeed Congress enacted § 13(c) precisely because of the importance it attached to "protecting workers affected as a result of adjustments in an industry *carried out under the aegis of Federal law.*" S. Rep. 82, 88th Cong., 1st Sess. 12 (1963). *See also* our opening brief at 17-18.

SAMTA attempts to write off § 13(c) by ignoring that part of the section that requires grantees to "continu[e] collective bargaining rights." *See* SAMTA Br. at 41-42. APTA at least recognizes that requirement but suggests that requiring collective bargaining is "less instrusive" than "imposing specific federal conditions such as

Appellees argue alternatively that, in relying on UMTA, we are "really making a Spending Power argument in a Commerce Clause case." SAMTA Br. at 42-43. Appellees attribute to us "the onerous notion that by accepting federal funds to assume a function necessary to the life of the community, state and local governments . . . unleased boundless federal Commerce Clause authority over an integral activity otherwise entitled to Tenth Amendment protection." APTA Br. at 39.

This entire argument begs the critical question. The issue here is whether, in operating transit systems, the States are "entitled to Tenth Amendment protection" *in the first instance.* Appellees' Spending Clause argument assumes the answer to that question, and proves only that if an affirmative answer is assumed UMTA does not require the States to surrender that immunity. But our point is that because UMTA was enacted before the States were significantly involved in the mass transit field and because state entry has been accomplished through a joint program with the federal government subject to federal regulation, transit operations are not a traditional state function and the States never acquired a Tenth Amendment immunity with respect to those operations.

Thus, we are not suggesting "that Congress, by providing UMTA funds through the exercise of its Spending Power, has implicitly eliminated the Tenth Amendment

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the FLSA requirements." APTA Br. at 41. APTA's suggestion is startling—we had not thought any employer would view an obligation to bargain collectively with its employees to be "less intrusive" than a requirement to pay minimum wages. (The history of collective bargaining in mass transit may well explain why "the wages of transit operators have exceeded that of other full-time city employees." National League of Cities Br. at 7.)

In any event APTA's claim concerning the relative burdens of § 13(c) and the FLSA is irrelevant since § 13(c) at least establishes that there is no tradition of state immunity from federal regulation with respect to the employment conditions of public transit employees.

limitation on its Commerce Clause powers," APTA Br. at 43, nor are we arguing that "receipt of [UMTA] funds can[] abrogate the Tenth Amendment rights of [recipients]," SAMTA Br. at 41. Rather, our submission is that because of the federal-state partnership that has been the hallmark of public mass transit, the federal government never lost its Commerce Clause power to regulate the wages and hours of employees engaged in the business of delivering mass transit services.

E. A recurring theme in appellees' briefs is that our position cannot be squared with the guidance afforded by *National League of Cities* as to which state activities are "integral operations in areas of traditional governmental functions." In that case, the Court indicated that "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" meet that test because "[t]hese activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. And appellees suggest that state operation of a mass transit system is more similar to "fire prevention, police protection, sanitation" and the like than to state operation of a commuter railroad.[6]

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[6] For present purposes, we indulge appellees' supposition that to the extent the *National League of Cities* "non-exhaustive" list of traditional and integral state functions clashes with the principles refined from the *National League of Cities* opinion in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) and *UTU*, the former rather than the latter prevail. We do so because, as we show in the text, even that unreasoned approach to the reading of this Court's cases and the proper means of perfecting constitutional law does not lead to the result appellees seek. But our response would be incomplete if we did not reemphasize the point made in our opening brief (at pp. 22-25) that the values embodied in the Tenth Amendment are implicated to only a limited degree by federal regulation of the States as service-providers (as distinguished from the States as lawmakers and law enforcers). That being so, it is our position that the *National League of Cities*' list not only fails to provide a sound foundation for resolving the instant case but should also, on an appropriate occasion, be reexamined.

From a functional standpoint it is obvious that mass transit systems provide a service that is quite different from those listed in *National League of Cities* and is virtually identical to the commuter railroad at issue in *UTU*. Indeed the only functional difference between mass transit and commuter railroads is the type of vehicle used to perform the service. In this regard, we agree with what APTA told this Court in its *amicus curiae* brief in *UTU* (at 6): "[T]he service performed is what is of constitutional significance, not the means selected by the state to perform that service."

Moreover, even if the functional similarities between mass transit and commuter railroads could somehow be set aside in determining whether there is federal regulatory power, mass transit still would be distinguishable from the services listed in *National League of Cities*. First, all of the services listed in *National League of Cities* are services the States have "traditionally afforded their citizens," as the Court twice noted. 426 U.S. at 851, 855. In contrast, state-owned mass transit systems are a recent phenomenon.[7] Second, unlike mass transit, the States had provided the services listed in *National League of Cities* long before the dawn of federal assistance and the States had, therefore, long acted free from federal regulation. While appellees attempt to find exceptions to this general rule, their efforts are unavailing and, giving appellees the benefit of every doubt, their few meager examples do not detract from the validity of the generalization.[8] Third, again in contrast to

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[7] Appellees' reliance on the history of state regulation of transit operations, *see* SAMTA Br. at 24-26, and of state responsibility for road construction, SAMTA Br. at 27; APTA Br. at 23, is misplaced. While transit systems, like a number of other private enterprises, have been regulated as "public utilities," and road building has been a public responsibility, transit systems were historically operated as *private business enterprises*. The Secretary of Labor develops this point in his opening brief (at 20-24) and appellees have made no reasoned response.

[8] For example, SAMTA asserts (Br. at 44) that "An activity specifically exempted in *National League*, which was essentially

mass transit, the services listed in *National League of Cities* are provided by the States to all citizens regardless of their ability to pay; thus there is, in the main, no charge for public schooling, fire prevention, police protection, or sanitation.[9] Fourth, and finally, the States

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created as a result of federal funding, is solid waste management (sanitation)." But "solid waste management" is simply a new form of an old activity—waste disposal—which has been a function of government as a result of the fact that waste collection is largely a governmental function; in earlier years, governments owned dumps, incinerators and the like for waste disposal. *See* E. Savas, *The Organization and Efficiency of Solid Waste Collection*, at 18-22, 35 (1977); American Public Works Association, *History of Public Works in the United States, 1776-1976*, at 433-39, 441, 447-48 (1976).

SAMTA also implies that the Hill-Burton Act played the same role in the development of public hospitals that UMTA did in the development of public transit. But long before Hill-Burton was passed there was a well-established tradition of publicly operated hospitals; indeed the oldest hospital in the United States is Philadelphia General Hospital which was opened in 1732, and by 1900 it was commonplace for a State, county, or city to operate a hospital. J. Hamilton, *Patterns of Hospitals Ownership and Control*, 68-69, 75-76, 79 (1961). And while it is true, as SAMTA notes, that Hill-Burton facilitated the growth of county hospitals, the very source that SAMTA relies on to establish that fact also establishes that Hill-Burton did not have that effect with respect to state or city hospitals. J. Hamilton, *supra*, at 69, 83.

[9] Appellees correctly note that some of the state services discussed in *National League of Cities* generate some revenue through charges. SAMTA Br. at 40; APTA Br. at 19-20. But that does not detract from the reality that the services in question are provided by the States to all citizens regardless of their ability to pay. For example, "every . . . state provides its citizens with free elementary and secondary schooling," *Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 3064 (1983); the education charges to which APTA refers are for specialized services such as summer school or driver education, *see id.* at 3065 n.2. Similarly, the public park charges on which SAMTA relies are also for specialized services such as use of campgrounds, *see* U.S. Dept. of the Interior, *Fees and Charges Handbook* at 9, 29 (1982); indeed, the very reason that governments have created and maintained parks is to provide "for the 'leisure of the people,'" and not just the affluent. *See* American Public Works Association, *supra*, n.8 at 555. And while public universities and public hos-

in providing the services listed in *National League of Cities* generally do not compete with profit-making businesses; in contrast, mass transit competes directly with forms of private transportation..

II. CONGRESS WAS NOT REQUIRED TO AMEND THE FLSA AFTER *NATIONAL LEAGUE OF CITIES* TO PRESERVE THAT ACT'S COVERAGE OF STATE-OWNED TRANSIT SYSTEMS.

Appellees argue that because *National League of Cities* held that the FLSA may not constitutionally be applied to some categories of public employees, a "subsequent amendment" is required before the FLSA may be applied to any group of public employees. Appellees advance two arguments in support of this proposition; neither can withstand analysis.

A. Appellees first suggest that "it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could no longer carry out its intent to cover all state and local employees." APTA Br. at 46; *see* SAMTA Br. at 49. What this Court said last Term in response to a similar argument in *INS v. Chadha*, —— U.S. ——, 103 S. Ct. 2764, 2774 (1983), is equally applicable here: "we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability. . . ." Section 219 of the FLSA expressly states that "If . . . the application of [any] provision to any person or circumstance is held invalid . . . the application of such provision to other persons or circumstances shall not be affected thereby." 29 U.S.C. § 219. This section thus refutes appellees' understanding of Congress' intent.[10]

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pitals generally charge user fees for their basic services, those charges are waived for those who cannot afford to pay. *See* Comm'n. on Financing of Hospital Care, *Factors Affecting the Costs of Hospital Care* at 6-8 (1954); Carnegie Foundation for the Advancement of Teaching, *The States and Higher Education*, 30, 46 (1976).

[10] It is noteworthy that on appellees' theory, *National League of Cities* should have culminated in a decree declaring the 1974 amendments to the FLSA invalid *in toto* and precluding their

Even apart from the severability clause, appellees' argument makes no sense. Appellees offer no reason to believe that Congress would view the application of the FLSA in the public sector to be an all or nothing proposition and would not wish to cover any public employee if every such employee could not be covered. In the private sector, the reverse always has been true: Congress has deliberately applied the FLSA to some categories of employees but not others.

There is, moreover, a specific indication that Congress would choose to apply the FLSA to state transit employees even though that Act cannot be applied to other specific categories of state employees. As previously noted, in enacting UMTA in 1964 Congress took special care to afford certain protections to transit workers. *See* pp. 7-8 n.5, *supra*. Moreover, the FLSA was amended to cover public transit employees in 1966, *see* P.L. 89-601, 80 Stat. 931, eight years *before* Congress amended the Act to apply to all public employees. The 1966 Congress so acted because public transit systems "are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose" and because Congress therefore concluded that "[f]ailure to cover . . . these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.'" H.R. Rep. 1366, 89th Cong. 2d Sess. 16-17

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application to any category of public employees. That is not, in fact, what occurred: this Court did not mandate such a decree, and on remand the district court entered an order approving an amendment to the Secretary's FLSA regulations which expressly contemplated that the FLSA would continue to be applied to public employees performing "non-traditional" functions. *See National League of Cities v. Marshall*, 429 F. Supp. 703 (D.D.C. 1977); 42 Fed. Reg. 32253 (June 24, 1977). The Secretary subsequently further amended that regulation to specify certain functions, including mass transit, as being "non-traditional," 29 CFR § 775.3(b) (1983), and it is the validity of that second amendment, insofar as it applies to public transit, that is at issue here.

(1966); S. Rep. 1487, 89th Cong. 2d Sess. 8 (1966). And the fact that, as a result of *National League of Cities*, the FLSA cannot be applied to all public employees in no way detracts from Congress' desire to assure that at least in the transit industry all workers—whether publicly or privately employed—are covered by the Act. Thus even apart from the severability clause previously quoted, there is every reason to believe that Congress would desire the FLSA to cover public transit employees even if the Act could not cover any other category of public employee.

B. Appellee SAMTA—although, significantly, *not* appellee APTA—advances a second argument: SAMTA contends that even if application of the FLSA to transit employees would best accord with congressional intent, such application is nonetheless precluded because that would require "add[ing] words of limitation (codifying the Court's 'traditional government function' holding) where none presently exist." SAMTA Br. at 47. According to SAMTA, courts are required to frustrate Congress' intent if furthering that intent would require "a court to add words to a statute." *Id.* SAMTA's argument is doubly flawed.

(1) Even if the rule of severability were as SAMTA contends—and it is not—SAMTA would not be helped. For if the 1974 amendments to the FLSA which extended the coverage of that Act to all public employees were deemed invalid *in toto*, the situation would then revert to that which existed prior to 1974.[11] At that time the FLSA applied to public transit operations by virtue of discrete provisions of that Act.[12] Specifically, under the 1961 and

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[11] *Cf. Frost v. Corporation Comm'n*, 278 U.S. 515, 525-27 & cases cited (1929).

[12] The statement in text requires one qualification. Under the 1966 Act, transit operators were not covered by the overtime provisions of the FLSA. P.L. 89-601, § 206. A discrete provision in the 1974 amendments phased out that special exemption. P.L. 93-

1966 amendments to the FLSA, the term "employer" was defined to include the State with respect to certain specified categories of employees, including transit employees, P.L. 89-601, § 102(b); the term "enterprise engaged in commerce" was defined to include a local transit enterprise with gross sales no less than $1,000,000, P.L. 87-30, § 2(c); and the term "activities performed for a business purpose" was defined to include activities in connection with a transit operation if "the rates and services of such [transit operation] are subject to regulation by a State or local agency," P.L. 89-601 § 102(a)(2). Thus, contrary to SAMTA's argument, even if *National League of Cities* precluded all application of the provisions at issue in that case, it still would not be necessary to add even a single comma to the FLSA in order for that Act to cover state transit employees.[13]

259, § 21(b)(1)(3), 88 Stat. 68. That provision was not involved in and is not affected by *National League of Cities*.

[13] In an attempt to avoid this conclusion, SAMTA contends that the 1966 amendments, which defined "activities performed for a business purpose" to include transit operations if "the rates and services of such [operations] are subject to regulation by a State or local agency," meant that "only public systems that are regulated by some other state or local agency are covered" and not those transit systems "that regulated their own rates and service." SAMTA Br. at 49 n.41. On this basis it is contended that SAMTA was not covered by the 1966 amendments and would not be covered if the 1974 amendments were deemed invalid *in toto*.

The legislative history of the 1966 amendments refutes SAMTA's argument. That history shows that Congress' intent was to eliminate the "distinction between a public or private local transit system," S. Rep. 1487, *supra*, at 26-27, because "[f]ailure to cover *all* activities of these enterprises will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which 'constitute an unfair method of competition in commerce,'" *see* p. 14, *supra*.

SAMTA bases its argument on written testimony by Carmack Cochran on behalf of the American Transit Association in 1971 with respect to a bill which would have extended the FLSA to all state employees (as the 1974 amendments eventually did). All that

(2) In any event, SAMTA is wrong in contending that the courts are precluded from reading words of limitation into a statute which is unconstitutional by virtue of its breadth and which Congress would want to apply more narrowly. In any severability case "[t]he question is one of interpretation and of legislative intent." *William v. Standard Oil Co.*, 278 U.S. 235, 241 (1929). "'[I]t is not an adequate discharge of [that] duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *U.S. v. Hutcheson*, 312 U.S. 219, 325 (1941), *quoting Johnson v. United States*, 163 F. 30, 32 (Holmes, J.). This is true in a severability case even when "the necessary remedial operation . . . is more analogous to a graft than amputation," *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J. concurring). *See also Heckler v. Mathews*, —— U.S. ——, 52 L.W. 4333, 4336 & n.1 (March 5, 1984).

This Court has not hesitated in other cases to engraft words onto a law it has found to be unconstitutional in order to cure the constitutional defect in the manner most consistent with Congress' intent. *E.g., Califano v. Westcott*, 443 U.S. 76 (1979). And because application of the FLSA to public transit employees would best further Congress' will, such application would be proper even if it

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Cochran said in his testimony is that the proposed FLSA amendment "would apply to public transit systems whether or not their rates and services are subject to regulation by a state or local agency," *Hearngs on H.R. 7130 Before the General Subcommittee on Labor of the House of Representatives Committee on Education and Labor*, 92nd Cong., 1st Sess. 206 (1971). Cochran did not suggest, as SAMTA now does, that absent the amendment the FLSA applied only to public transit systems that were externally regulated. And when the House Committee reported the proposed amendments, that Committee stated that "public employees employed in . . . local transit operations" were already covered by the FLSA by virtue of "the 1966 amendments". H.R. Rep. 92-672, 92nd Cong., 1st Sess. 6 (1971).

required the Court to read words of limitation into the 1974 amendments to the FLSA.[14]

CONCLUSION

For the above stated reasons the decision below should be reversed.

Respectfully submitted,

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[14] *United States v. Reese*, 92 U.S. 214 (1876), on which SAMTA relies, is not to the contrary. Although there is language in *Reese* which could be read to adopt a formalistic rule precluding engrafting words onto a law under any circumstance, this Court subsequently has understood *Reese* to rest on a determination as to the congressional intent underlying the particular statute at issue in that case and thus to be "but an exercise of judicial interpretation." *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 42 (1900). Furthermore, *Reese* involved a penal statute and the Court was concerned about the vagueness problem that could result if words of limitation were engrafted onto the law:

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. [92 U.S. at 221]

See also Baldwin v. Franks, 120 U.S. 678, 688 (1887).

Hill v. Wallace, 259 U.S. 44 (1922), on which SAMTA also relies, is likewise distinguishable. The Court's reasoning in *Hill* consists entirely of quotations from *Reese*, words which, as just noted, the Court has understood to be "an exercise of judicial interpretation." And the nonseverability holding of *Hill* undeniably follows Congress' intent with respect to the law at issue there.

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Nos. 82-1913 and 82-1951

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE SECRETARY OF LABOR

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE SECRETARY OF LABOR

The question in this case is whether provisions of the 1966 and 1974 amendments to the Fair Labor Standards Act (FLSA) that progressively extended minimum wage and overtime wage protection to employees of publicly owned mass transit systems are a permissible

exercise of Congress's authority to legislate under the Commerce Clause. This question was not resolved by the Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), because the statutory provisions that were at issue there are distinct from those now before the Court. See Gov't Br. 2-5.

In our opening brief we have explained that operation of a transit system is not a "traditional governmental function[]" within the meaning of *National League of Cities*, 426 U.S. at 852, and that application of the FLSA to transit systems poses no threat to the separate and independent existence of the states. Appellees' counter-arguments generally were anticipated in our opening brief and, for the most part, require no reply. Several points do warrant further comment, however.

A. 1. *National League of Cities* declared the Tenth Amendment principle that the National Government may not "'devour the essentials of state sovereignty'" (426 U.S. at 855 (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)). Thus Congress may not apply its vast power to regulate commerce directly upon activities of the states in a "'fashion that impairs the States' integrity or their ability to function effectively in a federal system.'" *National League of Cities*, 426 U.S. at 843 (quoting *Fry* v. *United States*, 421 U.S. 542, 6547 n.7 (1975)).

In this and in other areas of state immunity from federal legislation, however, the Court has been sensitive to the expanding "activity of state governments into new fields * * * [undertaking] the performance of functions not known to the states when the constitution was adopted" (*National League of Cities*, 426 U.S. at 870 n.10 (Brennan, J., dissenting)) and the tendency of state and local enterprises to make economic choices af-

fecting interstate commerce restricted only by parochial interests. See *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422-424 (1978) (Opinion of Burger, C.J.). Because a restraint on national power erected to prevent the destruction of state sovereignty might become a vehicle for the erosion of national authority and the integrity of federal power, the Court has been careful to limit areas of immunity to circumstances where federal control might "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*National League of Cities*, 426 U.S. at 852). The Court subsequently explained that its repeated "emphasis on traditional government functions and traditional aspects of state sovereignty" was "meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 686-687 (1982) (quoting *National League of Cities*, 426 U.S. at 851).

The Court has refused to recognize any "sacred province of state autonomy," but has carefully limited the states' immunity to "core state functions" (*EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 9). Rejecting "pernicious abstractions" (*Graves* v. *New York*, 306 U.S. 466, 489-490 (1939) (Frankfurter, J., concurring)), the Court has delimited the sphere of Tenth Amendment immunity from Commerce Clause legislation to what is actually necessary to preserve the separate and independent existence of the states (*EEOC* v. *Wyoming*, slip op. 9).

Appellees suggest that Tenth Amendment immunity must be extended to publicly operated transit enter-

prises simply because they are publicly operated and because the services provided are needed by the persons who use them. See APTA Br. 9, 16; SAMTA Br. 33-34. But this submission represents a radical departure from the Court's prior decisions. The importance of transit or any other service to those who use it simply does not provide a measure of the impact *upon state sovereignty* of federal legislation applying uniform wage standards to enterprises in the public and private sector. In today's society, many goods and services are "essential" to public welfare. Yet a decision by the states to take over the provision of food, clothing or the channels of communication to their citizens plainly could not justify abrogation of the authority of Congress to legislate, in the national interest, regarding these vital components in the stream of commerce.

2. Fifty years ago, in *Helvering* v. *Powers*, 293 U.S. 214 (1934), this Court unanimously held that the municipal operation of a street railway, "[w]hile * * * for the public benefit, * * * is still a particular business enterprise" (*id.* at 223) and not a field of activity which required protection from federal taxation in order to protect the independence of state government. The operation of such an enterprise was described by Chief Justice Hughes as "distinct" from "usual governmental functions" (*id.* at 227). Appellees brush *Powers* aside as an antique, conveniently overlooking that they are trying to prove that municipal transit systems are "traditional" governmental functions. *Powers* establishes at minimum that more than a century into this Nation's existence no member of this Court viewed a public transit system as even a "governmental," much less a "traditional" governmental, function.

Just a term ago, in a decision that appellees are unable to characterize as out-of-date, this Court again

unanimously remained unconvinced that a publicly owned and operated commuter railroad is a traditional government function. *Long Island R.R.*, 455 U.S. at 686. The holding of *Long Island R.R.* leaves little room for appellees' argument that operation of a transit system free of the requirements of uniform federal legislation regulating commerce is essential to preservation of state sovereignty. The Court there rejected a virtually identical claim, stating:

> "[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause. . . ."

455 U.S. at 685 n.11 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (opinion of Burger, C.J.)). Appellees struggle to find factual distinctions between a commuter railroad and a transit system (see page 12 & note 7, *infra*). But even if these technical distinctions had substance, they simply could not justify adopting disparate rules of constitutional law for commuter railroads and other transit operations; the dispositive fact is that neither commuter railroads nor other transit operations "provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities*, 426 U.S. at 855).[1]

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[1] APTA stated in 1981 that commuter railroads "are rapidly being merged into the transit industry" and without exception "are now either publicly owned or receive financial support from public agencies." *Transit Fact Book 1981*, at 18. And in its amicus curiae brief in *Long Island R.R.*, APTA remarked (at 21) that "this Court should not evaluate commuter trains in isolation, but rather it should consider them as an integral part of local urban mass transportation systems throughout the United

B. 1. The government's opening brief canvassed the numerous attributes of publicly operated transit systems that set them apart from the "traditional governmental functions" held to be immune from the operation of the Fair Labor Standards Act in *National League of Cities*. These include: the historic predominance of the private sector in providing local transit services, the infant status of the public sector of the industry, and the continuing role of private carriers (Gov't Br. 16-24); the critical role of federal financial aid in making possible the acquisition and operation of transit services by local governments in recent years (Gov't Br. 26-38); the existence of substantial federal regulatory legislation governing labor relations and terms of employment in the local transit industry that was in place by the time significant numbers of local governments began to acquire transit systems (Gov't Br. 39-43); the absence of any untoward impact upon state prerogatives resulting from application of the FLSA to public transit employment (Gov't Br. 43-46); and the potent federal interest

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States." Respondent (see Br. 7, 18-24 & nn.22-23) and the other amici supporting it in *Long Island R.R.* made the same point (see Nat'l League of Cities Br. 10-12; Nat'l Inst. of Mun. Law Officers Br. 3, 10-17). Of course, as APTA observes (Br. 14 n.15, 26 n.38), we pointed out in *Long Island R.R.* that the question presented in this case did not have to be resolved there, and that differences existed between the role of local government in commuter rail operations and in other forms of transit. But nothing in our earlier brief suggests that mass transit operations meet the test for Tenth Amendment immunity. Moreover, it is difficult to understand how APTA can maintain (Br. 15-16) that transit services are an inseparable part of a city's larger transportation network, yet that different constitutional rules should apply to a commuter railroad and bus or subway operations conducted by the very same governmental entity. (The Long Island Railroad is operated by New York's Metropolitan Transportation Authority, which also operates New York City's buses and subways. See Resp. Br. 1-2, *Long Island R.R.*)

in preventing unfair competition in commerce, which, Congress determined, required FLSA coverage of public transit employment (Gov't Br. 46-48). In the aggregate these factors show that the transit provisions of the FLSA pose no threat to state sovereignty.

Appellees' response, by and large, is to suggest one example or another of a service, claimed to be immune from operation of the FLSA under the teaching of *National League of Cities*, that allegedly shares one of the special attributes of the local transit industry.[2] The particular analogies drawn by appellees generally are dubious, at best. A more significant and revealing consideration, we submit, is that appellees do not—and cannot—identify any state or local governmental activity recognized to be within the protected sphere delineated in *National League of Cities* that possesses anything like the combination of distinguishing attributes that set the public sector of the local transit industry apart.

For example, appellees observe (APTA Br. 25 n.33; SAMTA Br. 35-37) that hospitals and schools, like transit, currently are found in the private as well as the public sector.[3] But appellees forget that the public sec-

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[2] See generally SAMTA Br. 33-40, 43-44; APTA Br. 25 n.33, 33-34, 38 n.57, 39-40 & n.61.

[3] We note that appellees utilize incommensurable statistics in making these comparisons, highlighting for instance (APTA Br. 25 n.33) the proportion of *schools* that are privately operated. But the data that we have presented (see Gov't Br. 16-18) reflect the proportion of American *communities* that have assumed responsibility for local transit service. Appellees have not identified a single community in the United States that relies exclusively on private schools. The states' and municipalities' perception that education is a service they have a sovereign duty to provide—irrespective of the availability of private sector alternatives—reflects that education, unlike transit, is among the "functions * * * which governments are created to

tor in these fields was well established before the enactment of the FLSA—and long before its extension to cover public employment. And there is no evidence whatsoever that public participation in these fields resulted from governmental takeovers of private enterprises previously subject to the FLSA, much less that such a transformation was materially assisted by substantial federal funding.

Similarly, appellees adduce other examples of state or local governmental activities that have been substantially assisted with federal funds (APTA Br. 38 n.57; SAMTA Br. 43), such as construction of wastewater treatment plants.[4] But in none of these examples was a service traditionally performed by the private sector subject to the FLSA converted to public operation, thereby eroding federal constitutional authority. In other instances cited by appellees, such as the education of handicapped children (see APTA Br. 38 n.57), federal funds have encouraged or made possible the augmentation of existing services or provision of public services to an expanded client population within an existing area of local governmental responsibility. Such enhancement or expansion of existing services is hardly comparable to the dramatic conversion of the entire field of local transit service from the private sector to

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provide" (*National League of Cities*, 426 U.S. at 851). Cf. *Plyler* v. *Doe*, 457 U.S. 202, 221-223 (1982).

[4] If, as appellees assert, these plants simply would not exist but for the availability of federal funding, it might well be entirely proper for Congress to require FLSA protection for the employees of such plants. Contrary to appellees' assumption, the mere characterization of "sanitation" as a traditional government function in *National League of Cities*, 426 U.S. at 851, does not resolve this issue. Cf. 29 C.F.R. 775.3(b) (FLSA may be applied to production and sale of organic fertilizer as a by-product of sewage treatment; see Gov't Br. 6).

the public sector that occurred in many communities in recent years. Unlike the former, the latter serves—if the decision below should stand—to repeal the established federal wage and hour protections applicable in an entire industry.

The wholly artificial exercise of examining in isolation particular facets of the complex of attributes that distinguish the public sector of the transit industry from the protected "traditional governmental functions" identified in *National League of Cities* cannot assist appellees. The ultimate inquiry required by *National League of Cities* and its progeny is "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *Long Island R.R.*, 455 U.S. at 686-687 (quoting *National League of Cities*, 426 U.S. at 851). This heavy burden cannot be met by a showing that transit shares selected attributes of activities previously identified as protected.[5]

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[5] Appellees seek (APTA Br. 12-14; SAMTA Br. 15-17) to foreclose consideration by the Court of whether application of the FLSA to public transit systems unduly intrudes upon the states' "ability 'to structure integral operations'" (*Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (quoting *National League of Cities*, 426 U.S. at 852)) or whether "the nature of the federal interest advanced" here is "such that it justifies state submission" (*Hodel*, 452 U.S. at 288 n.29). But it would be improper to read *National League of Cities* to prevent examination of any element of the established tests for Tenth Amendment immunity.

The transit provisions of the FLSA amendments of 1966 and 1974 were not before the Court in *National League of Cities*. Moreover, the Court carefully canvassed the effects of the wage and hour requirements as applied to the traditional governmental functions involved in *National League of Cities*. It determined that they entailed "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state

2. a. In their efforts to portray local transit service as a "traditional governmental function," appellees engage in a substantial exercise in historical revisionism (see APTA Br. 23-24; SAMTA Br. 26-28). This is best demonstrated by tracing the course of APTA's own utterances on this subject. As recently as December 1979, contemporaneous with the filing of the complaint in this action, APTA's official public literature proclaimed bluntly: "Public ownership of transit is a recent development." *Transit Fact Book* 55 (1978-1979 ed.). Less than two years later, with this litigation going forward, APTA reversed its assessment 180 degrees, stating, based on the very same data, that "[p]ublic ownership of transit *is not* a recent development" *Transit Fact Book 1981*, at 27 (1981) (emphasis added). Similarly,

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decisionmaking" amounting to a "wide-ranging and profound threat to the structure of State governance" (*EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1984), slip op. 13). Only then was the Court able to conclude that the states' ability to set wages for employees performing these particular governmental functions free of the impact of federal law was an integral part of state sovereignty. See 426 U.S. at 845-852. By contrast, we have presented substantial arguments, not answered by appellees, that no such impermissible effect is portended by the distinct statutory provisions at issue here (see Gov't Br. 43-46). And the transit provisions of the FLSA rest upon Congress's determination that application of the FLSA to the public sector of the transit industry is required in order to prevent unfair competition (see Gov't Br. 46-48)—a consideration nowhere addressed in *National League of Cities*.

The presumption of constitutionality that cloaks the 1966 and 1974 transit amendments to the FLSA (see *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) accordingly cannot be overcome without consideration of all the factors that bear upon the question presented. Indeed, to artificially constrict the range of the Court's inquiry in this case would be inconsistent with the Court's explanation in *National League of Cities* (426 U.S. at 852-853) of its refusal to overrule *Fry* v. *United States*, 421 U.S. 542 (1975).

while appellees now attempt to minimize the significance of federal financial assistance (APTA Br. 38), APTA acknowledged in 1981 that federal funding for local transit in the 1960's saved transit in "many cities" from "extinction," and that federal aid has since increased "many times." *Transit Fact Book 1981*, at 29-30. Indeed, even today, amici curiae National League of Cities et al. appear to acknowledge (Br. 5-6) that although some public transit systems existed prior to the advent of federal assistance, the major shift of transit service from the private sector to the public sector followed, and was dependent to a critical degree upon, the availability of substantial federal financial assistance. Appellees' effort to characterize the public sector of the local transit industry as an independent creation of state or local government of long standing accordingly should be greeted with skepticism.

b. As an alternative to this effort to recast history, appellees fall back upon the district court's observation (J.S. App. 4a) that transportation-related activities such as road building are historically associated with the public sector (see SAMTA Br. 45-46; see also APTA Br. 15-17, 23). But there is no warrant for treating all transportation-related activities as a single service for purposes of Tenth Amendment analysis. Plainly, that approach was not followed in *Long Island R.R.* (see Gov't Br. 20-21). And *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), slip op. 3 & n.6, rejects any such indiscriminate approach to the contours of Tenth Amendment immunity.

In any event, appellees' argument is simply factually insupportable. The employees whose eligibility for minimum wage and overtime protection is at issue here are those who operate, service and administer a transit sys-

tem. Such employees are in no respect interchangeable with those engaged in road building or planning a transportation infrastructure. A tradition of state responsibility for road building or maintenance is accordingly no more relevant in determining the availability of Tenth Amendment immunity for transit operating and administrative employees than is private sector performance of the function of manufacturing motor vehicles, which undoubtedly provide the bulk of local transportation.[6]

c. Like the district court (see J.S. App. 5a), in its effort to establish the elements of Tenth Amendment immunity, SAMTA seizes upon (Br. 24-26) state *regulation* of local transit service as a substitute for the absent tradition of state *operation* of transit systems (see also NLC Br. 4-5). We have already explained (see Gov't Br. 21-24) why this reasoning is alien to this Court's Tenth Amendment teaching. SAMTA, however, points (Br. 24) to this Court's observation, in *Long Island R.R.*, at the end of its recitation of the long history of federal regulation of employment rela-

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[6] Appellees' reliance (SAMTA Br. 5-6 n.3, 45-46; APTA Br. 5 n.8, 23) on *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982), is misplaced. There the court held, as a matter of statutory interpretation, that the FLSA does not apply to employees of the Puerto Rico Highway Authority whose "work is related to the Authority's road building and maintenance activities" (*id.* at 846). Tenth Amendment principles were invoked only by analogy to guide the court in statutory interpretation (*id.* at 846-847). Although the court observed that the Puerto Rico Highway Authority "*plans to build* a mass transit system" (*id.* at 845; emphasis added), its decision rested upon the individual plaintiff/employees' jobs—in road building and maintenance (*id.* at 846)—and in no respect suggests that *operation* of a transit system should be regarded as a traditional governmental function inseparable from responsibility for road construction. As noted in our opening brief (at 10 n.13), the courts of appeals uniformly have rejected the claim advanced by appellees in this case.

tions in the railroad industry, that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry" (455 U.S. at 688). But the Court's comment, read in context, hardly suggests that the existence of such a tradition would suffice to override the federal interest in application of a uniform regulatory scheme. See also *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289-292 & n.31.[7] At most this would be one factor that might be considered in balancing the federal and state interests. See *id.* at 288 n.29.

As it happens, however, there is no need to undertake a refined balancing analysis here. As explained in our opening brief (at 39-43), substantial federal regulation affected wages, collective bargaining, and other aspects of labor relations in the private sector of the transit industry by the time the bulk of the recent conversions of transit operation to public ownership occurred.[8] By contrast, state regulation of private local

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[7] SAMTA generally makes the mistake of treating each of the observations offered to buttress the holding of *Long Island R.R.* that the Railway Labor Act may constitutionally be applied to a state owned commuter railroad as a negative pregnant prescribing a different result if any of the facts of the case were altered (see SAMTA Br. 17-29). But, as the unanimity that attended the Court's decision in *Long Island R.R.* attests, the multiplicity of factors supporting the Court's decision simply reflects that the decision was a relatively clearcut one. Application of the teaching of *Long Island R.R.* requires more than mere mechanical comparison of the facts of the two cases.

[8] SAMTA suggests (Br. 22-23) that, because the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, applies to certain private sector counterparts to protected functions enumerated in *National League of Cities*, that statute may not be considered in determining whether a state takeover of services previously performed by the private sector impermissibly erodes federal authority. But the problem of erosion of federal

transit operations did not, even by appellees' account (see SAMTA Br. 25-26 & n.20; see also NLC Br. 4-5), extend to any facet of labor relations, much less to wages and overtime.

3. Appellees devote a considerable portion of their argument (APTA Br. 35-45; SAMTA Br. 41-45) to disputing what they mischaracterize as a "Spending Power argument in a Commerce Clause case" (SAMTA Br. 42-43). But the significance to our argument of federal grants to local public transit systems is hardly "elusive" (compare APTA Br. 35-36). It is simply this: to the extent that Tenth Amendment immunity may extend to local governmental functions that are manifestly not "traditional" in the strict historical sense (see Gov't Br. 24-26), it necessarily is pertinent to inquire how the "new" function came to be established in the public sector.

On that question appellees cannot dispute the historical record. Private transit systems in many cities were taken over by local government with substantial federal financial assistance. The representatives of local government told Congress, and Congress found as a fact, that, in many cities, local transit service could not survive without federal financial assistance that made possible public acquisition and improvement of existing private systems. In view of the critical role of federal

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authority arises only when a new public sector endeavor is created by conversion of private sector activities. Moreover, contrary to SAMTA's further suggestion, to bar such erosion of federal authority is not to impose a fixed view of state functions inconsistent with *Long Island R.R.* Rather, there is an important distinction between genuinely new state services that may, in some instances, reshape the protected sphere of state activity without vitiating federal sovereignty, and functions taken over from the private sector that were previously subject to federal regulation. See *Long Island R.R.*, 455 U.S. at 686-687.

funding in establishing mass transit in the public sector, it is unrealistic to portray transit as the kind of "core state function" (*EEOC* v. *Wyoming*, slip op. 9) that cannot be covered by uniform federal legislation establishing fair wage standards without critically endangering the survival of the states as independent entities. See *Long Island R.R.*, 455 U.S. at 686-687; see also *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 815 (1976) (Stevens, J., concurring). Appellees simply cannot have it both ways, stressing the non-"static" aspects of state sovereignty while ignoring the path that led from past to present.[9]

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[9] As we have previously explained (Gov't Br. 24-26), nothing in *Long Island R.R.* should be understood to adopt an ahistorical approach to the scope of state immunity from federal enactments under the Commerce Clause. Indeed, the additional evidence canvassed in that case (455 U.S. at 687-688) was largely historical in nature.

Nor, contrary to SAMTA's suggestion (Br. 31-32), is a different rule required by *Brush* v. *Commissioner*, 300 U.S. 352, 370-371 (1937). Subsequent decisions in the area of tax immunity make clear that the language cited by SAMTA represented only an interpretation of the applicable Treasury regulation, which adopted an ahistorical standard. See *Helvering* v. *Gerhardt*, 304 U.S. 405, 422-423 (1938). And in *New York* v. *United States*, 326 U.S. 572 (1946), a plurality of the Court, speaking through Chief Justice Stone, rejected an ahistorical approach, at least to the extent that it would "accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning" (326 U.S. at 588). At the same time, Justice Frankfurter, joined by Justice Rutledge, condemned an ahistorical standard as "too shifting a basis for determining constitutional power and too tangled in expediency to serve as a dependable legal criterion" (326 U.S. at 580).

The Court has recently recognized the hazards of adopting such shifting rules of law. *First National City Bank* v. *Banco Para El Commercio Exterior*, No. 81-984 (June 17, 1983), slip op. 22 n.27. In our opening brief we also noted (at 50-51) the burdens that would be imposed upon Congress by judicial ac-

Contrary to appellees' contention (APTA Br. 39; SAMTA Br. 42), nothing in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), suggests that the federal funding that made possible much of the growth of the public sector of transit industry must now be disregarded. *Pennhurst* embodies a rule of statutory construction useful in determining otherwise ambiguous legislative intent, when it is argued that a federal statute enacted under the spending power imposes requirements on states that accept federal funds. Cf. *EEOC* v. *Wyoming*, slip op. 16 n.18. Here, of course, there is no question but that Congress intended to extend the FLSA to publicly operated transit systems. The only question presented is whether Congress exceeded its constitutional power in doing so, a question as to which *Pennhurst* has no bearing. Federal funding is relevant to the constitutional question because it is critical to assessing the nature and significance of recent growth of the public sector of the transit industry. Because we do not contend that compliance with the FLSA was a requirement imposed upon the states by the Urban Mass Transportation Act of 1964 (UMT Act), and because the authority of Con-

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ceptance of a formless and ahistorical standard for Tenth Amendment immunity. We explained that our constitutional regime assigns to Congress both the competence and the primary responsibility for making adjustments in federal legislation to reflect altered social or economic circumstances that affect the exercise of federal commerce power. It is sheer sophistry to respond, as APTA does (Br. 32 n.49), that the public transit provisions of the FLSA became unconstitutional on the date *National League of Cities* was decided. Undoubtedly that decision marked a significant departure in this Court's Tenth Amendment jurisprudence. But APTA nowhere takes issue with our observation (Br. 49) that the transit provisions of the FLSA were valid when enacted, even under the law as established in *National League of Cities*.

gress to enact the FLSA rests on the Commerce Clause, the rule of statutory construction reflected in *Pennhurst* has no application here.

Appellees' reliance (APTA Br. 41; SAMTA Br. 41) on *Jackson Transit Authority* v. *Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), is also misplaced. The issue in that case was whether Section 13(c) of the UMT Act, 49 U.S.C. 1609(c), creates a federal cause of action to enforce an agreement between transit labor and management, entry into which was contemplated by the federal statute. Because we do not rely in this case on the legislative effect of Section 13(c) or any other provision of the UMT Act, the Court's comment in *Jackson Transit*, 457 U.S. at 27, that the UMT Act did not create a body of federal transit labor law is likewise irrelevant.

4. APTA argues (Br. 20-21; see also NLC Br. 9-10) that, contrary to Congress's considered judgment (see Gov't Br. 46), application of the FLSA to transit operating employees would cause certain poorly defined special hardships for public transit systems because of work scheduling practices common in the industry. Deference to the legislative judgment is particularly appropriate in this instance. Appellees have not shown any flaw in Congress's determinations that overtime pay comparable to that required by the FLSA was generally required by collective bargaining agreements in the public transit industry and that any special problems of application could be resolved through collective bargaining or in the administrative process (see H.R. Rep. 93-913, 93d Cong., 2d Sess. 30-31 (1974)).

In sum, appellees have wholly failed to demonstrate concrete burdens upon their sovereign prerogatives that would flow from application of the FLSA to public transit systems. The power of Congress to regulate

commerce may not be interdicted on so flimsy a foundation.

For the foregoing reasons, and the reasons set forth in our opening brief,[10] the judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1984

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[10] Appellees have, for the third time (see Gov't Reply Mem. at the jurisdictional stage 2 & n.1), pressed their argument (APTA Br. 46-47; SAMTA Br. 47-50) that the public transit provisions of the FLSA are not severable from the applications of the Act that were invalidated in *National League of Cities*. We have responded to this argument in our Reply Memorandum at the jurisdictional stage (at 2-5). It is wholly irrelevant, in this regard, whether SAMTA itself was subject to the 1966 FLSA amendments (compare SAMTA Br. 49 n.41). Even if it were not, Congress's intention to bring transit employment under the umbrella of the FLSA independently of its application to other public employees is readily apparent from the 1966 and 1974 FLSA amendments, which made special provision for covering transit employees (see Gov't Br. 2-4). In fact, however, the 1966 amendments to the FLSA covered employees of a local transit system "if the rates and services of such [system] are subject to regulation by a state or local agency (regardless of whether or not such [system] is public or private or operated for profit or not for profit)." 29 U.S.C. (1970 ed.) 203(r)(2). There is no warrant for reading this language to exclude from FLSA coverage transit systems operated by local government entities that regulated their own fares and services.

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Nos. 82-1913 and 82-1951

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1913 and 82-1951

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

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BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

In its Order of July 5, 1984, the Court requested the parties to this case to address the following question:

> "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?"

In Part I we urge an affirmative answer to that question.[1]

National League held that considerations of state sovereignty, embodied in the Tenth Amendment, place

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[1] In the briefs we filed last Term, we demonstrated that it is not necessary for the Court to overrule *National League* in order to reverse the judgment below and sustain the application of the Fair Labor Standards Act to public transit employees. We rest on that demonstration with respect to how this case should be decided under the principles of *National League* and its progeny.

"an affirmative limitation on the exercise of [Congress'] power" under the Commerce Clause, 426 U.S. at 841. But the text of the Constitution, the proceedings at the constitutional convention, the *Federalist Papers*, and the debates which led to the enactment of the Tenth Amendment all establish that *National League* has distorted the relationship between the Federal Government and the States which the framers of the Constitution intended to create. Pp. 5-12, *infra*. As James Madison said:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with laws, or even the Constitution of the States. [II *Annals of Cong.* 1897 (Remarks of James Madison)]

National League is also contrary to the precedents in this Court which, beginning with Chief Justice Marshall's opinions in *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Gibbons v. Ogden*, 9 Wheat. 1 (1824), have adhered to this fundamental principle. And from *Sanitary District v. United States*, 266 U.S. 405 (1925) (Holmes, J.) to *Maryland v. Wirtz*, 392 U.S. 183 (1968) (Harlan, J.), the Court consistently applied Madison's teaching with undiminished force when States were subjected to regulation under the Commerce Clause, scrutinizing such regulations to insure that they were, indeed, regulations of commerce and sustaining them if they passed that test. Pp. 12-20, *infra*.

The decisions which were cited in support of the decision in *National League* provide no support for the conclusion that Congress' delegated power to regulate commerce is diminished because a State, rather than a private party, is engaged in the activity which constitutes commerce. Pp. 20-24, *infra*. And the tax immunity doctrine, on which *National League* relied, not only is inapposite but, moreover, the troubled history of that doctrine vindicates the framers' decision not to attempt

to subordinate Congress' enumerated powers to considerations of state sovereignty. Pp. 24-30, *infra*.

Finally, to complete our showing, we demonstrate that even on its own terms, *National League* cannot withstand close analysis, for the limitations it places on Congress' power are lacking in logic and not susceptible to principled judicial application. Pp. 30-33, *infra*.

For all these reasons we respectfully urge that *National League* be overruled.

In Part II we argue that even if *National League*'s holding that there is a state-sovereignty restriction on Congress' commerce power were not overturned, the extent of that restriction should be limited in two respects.

First, as we show in Part II(A), the States should not be immunized from federal regulation when they act as providers of goods or services. State activity creating goods and services is economic activity which can powerfully affect interstate commerce, and the entire point of the Commerce Clause is seriously jeopardized by denying Congress the power to regulate such activity. Moreover, the creation of goods and services is not an essential attribute of sovereignty; as to any given service, many entities that are not sovereign perform the service, and many entities that are sovereign do not. State sovereignty is secure so long as the law-making and law-enforcement functions (within the realm open to the States) are unimpaired. Pp. 34-43, *infra*.

Second, in Part II(B), we show that activities of political subdivisions should not be clothed with Tenth Amendment immunity. The Court has repeatedly held that the Eleventh Amendment—which places an express limit on federal (judicial) power in order to protect state sovereignty—does not afford any shelter to local governmental bodies. There is no greater reason for stretching the implied immunity of the Tenth Amendment beyond any natural boundary to protect such local entities. Pp. 44-46.

ARGUMENT

I. THE TENTH AMENDMENT PRINCIPLES OF *NATIONAL LEAGUE OF CITIES v. USERY*, 426 U.S. 833, SHOULD BE RECONSIDERED AND OVERRULED

A. In *National League* this Court held that Congress acted unconstitutionally in extending the Fair Labor Standards Act to various classes of state and local employees. 426 U.S. at 851-52. In so holding, the Court recognized that the FLSA amendments were "fully within the grant of legislative authority contained in the Commerce Clause," *id.* at 841, but concluded that the Act nonetheless "transgresses an affirmative limitation on the exercise of [Congress'] power," *id.* The Court explained:

> [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. [*Id.* at 845]

To the extent the Court identified a source for the limitation announced in *National League* that source was the Tenth Amendment, *see id.* at 842.

The premise of *National League*'s holding was that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States' ", 426 U.S. at 844, *quoting Texas v. White*, 7 Wall. 700, 725 (1869). The validity of that premise cannot be denied. The framers of the Constitution clearly envisioned a federal system—one in which both the federal government and the States possess sovereign authority.

The *National League* opinion proceeds on the theory that this premise carries with it two further propositions: first, that the framers must have intended that federal sovereignty is subject to being subordinated to state sovereignty—in *National League*'s words, that considerations of state sovereignty place "an affirmative limitation on the exercise of [Congress'] power" under the

Commerce Clause, 426 U.S. at 841; and second, that the framers intended to enforce this "affirmative limitation" by vesting the judiciary with a commission to invalidate laws enacted by the legislative branch which the judiciary views as unduly intrusive on state sovereignty. As we proceed to show, those propositions are, in fact, entirely alien to the scheme of government the framers intended.

B. The Constitution carefully enumerates the powers that the framers intended to delegate to the federal government. The Tenth Amendment in terms makes explicit that which otherwise would be implicit in that enumeration—that the federal government is to exercise only those powers that have been delegated, and that the powers not "delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But the text and structure of the Constitution contains no hint of the rule announced in *National League* that powers that are delegated to the federal government nonetheless are to be limited (through case-by-case judicial review) in the interest of preserving state sovereignty. To the contrary, Article VI of the Constitution declares that,

> This Constitution, *and the Laws of the United States which shall be made in Pursuance thereof* . . . shall be the Supreme Law of the Land . . . any Thing in the constitution or Laws of any States to the contrary notwithstanding.

Moreover, the suggestion that the framers intended to subordinate federal power to concerns of state sovereignty fundamentally misconceives the very essence of the enterprise undertaken and carried through at the constitutional convention. The purpose of that convention, after all, was to replace the Articles of Confederation, which created merely a confederacy of sovereign States, with a national government to which each State would necessarily surrender certain sovereign powers. One of the first acts of the convention was to defeat the New Jersey plan, which would have "revised, corrected

and enlarged"—but not replaced—the Articles of Confederation, and to instead embrace the Virginia plan which called for a "national Government . . . consisting of a *supreme* Legislative, Executive and Judiciary" (emphasis added).[2] And at the convention the framers *defeated* a proposal which would have precluded Congress from "interfer[ing] with the government of the individual states in any matters of internal policy which respect the government of such states only, and wherein the general welfare of the United States is not concerned."[3] Thus, as Professor Scheiber has observed:

> [t]he delegates . . . were willing to confront an inevitably powerful opposition to ratification based on

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[2] *See* W. Murphy, *The Triumph of Nationalism* 146 (1967); Diamond, *What the Framers Meant by Federalism* in R. Golden (ed.), *A Nation of States* 30-31 (1963).

[3] W. Murphy, *supra* n.2, at 179. Also indicative of the framers' views on the respective roles of the federal and state governments is the fact that a proposal to authorize Congress to "negative" (*i.e.*, veto) any state law was defeated by only one vote, II M. Farrand (ed.), *The Records of the Federal Convention*, 391 (1911). Moreover, the opposition to negativing was based upon the fact that the amendment was "unnecessary," II *id.* at 390 (Mr. Sherman), 391 (Mr. Williamson and Mr. Gouverneur Morris) in light of the alternative protection of federal power in the Supremacy Clause which opponents of negativing had proposed earlier in the convention and which had been adopted, *see* II *id.* at 28-29. *See also* W. Murphy, *supra*, at 218-19; Scheiber, *Federalism and the Constitution: The Original Understanding*, in L. Friedman & H. Scheiber (eds.), *American Law and Constitutional Order* 89 (1978).

It is also noteworthy in this regard that the first Congress, in drafting the Bill of Rights, adopted recommendations that the States had made during the ratification process that were protective of individual rights, but rejected all recommendations that were aimed at enhancing state sovereignty at the expense of federal authority, such as proposals by New York, Massachusetts and Virginia to limit the federal taxing power to instances in which a State failed to provide revenue for the federal government and to limit the federal power to regulate congressional elections to instances in which a State failed to establish appropriate laws in that regard. *See* W. Murphy, *supra*, at 337, 368, 385. *See also* n.21 *infra*.

> the popular fear of centralized government, even at the risk of losing all, precisely because they thought all had been nearly lost already. National government under the Articles of Confederation, they thought, was a nullity incapable of pursuing the great purposes of nationhood.[4]

The role that the framers envisioned the States would play within the federal system is revealed quite clearly in the writings and speeches of James Madison.[5] In a letter to George Washington shortly before the constitutional convention began, Madison stated his goal to be a "due supremacy of the national authority" which would "not exclude the local authorities *wherever they can be subordinately useful.*" W. Murphy, *supra* n.2, at 63 (emphasis added). During the course of the convention Madison argued that "[w]ere it practicable for the General Government to extend its care to every requisite object without the cooperation of the State Governments the people would not be less free as members of one great Republic than as members of thirteen small ones" and that therefore even if there were to be "a tendency in the General Government to absorb the State Governments no fatal consequence could result." I *Records of the Federal Convention*, *supra* n.3 at 358. *See also* I *id.* at 463, 471. And while serving in Congress Madison stated (during the debates over the creation of the Bank of the United States):

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it;

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[4] Scheiber, *supra* n.3 at 86. *See also e.g.*, Diamond, *supra* n.2 at 37; W. Murphy, *supra* n.1; G. Wood, *The Creation of the American Republic, 1776-1787* at 467 (1969).

[5] We focus on Madison's views in text because of his central role at the constitutional convention. Madison assumed that role precisely because he had the faculty to articulate the majority's sentiments, as is made clear by Professor Murphy's thorough review of the views of the individual delegates. *See* W. Murphy, *supra* n.2, at 58-142.

> if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.[6]

In *The Federalist Papers* Madison addressed at length the question whether "the powers transferred to the federal government . . . will be dangerous to the portion of authority left in the several States."[7] He answered that question in the negative, not because he believed that there were judicially-enforceable affirmative limitations on the exercise of the powers that were delegated to Congress (such as the limitation the Court discovered in *National League*) but rather because Congress' powers were limited to those enumerated in the Constitution and because of *political constraints* that Congress would face in exercising its enumerated powers. Madison stated the crux of his argument as follows:

> The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments [the federal and State governments] not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivate may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every

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[6] *II Annals of Cong.* 1897 (Remarks of James Madison). The Court quoted this statement as authoritative in *Sperry v. Florida Bar*, 373 U.S. 379, 403 (1963) and in *Reina v. United States*, 364 U.S. 507, 512 (1960).

[7] *The Federalist Papers*, No. 45, p. 288 (Rossiter ed.). The question Madison posed reflected one of the two principal grounds of opposition to the proposed Constitution advanced by the anti-federalists. *See* W. Murphy, *supra* n.2, at 400.

> case should be supposed to depend on the sentiments and sanction of their common constituents.[8]

Madison added that while it was "beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States," if that were to change, "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."[9] Thus, as students of the constitutional debates consistently have concluded:

> [I]n the last analysis the settlement of conflicts between the states and Congress would have to be decided by the informal political process. When the framers took up the defense of the Constitution against Antifederalist critics during the ratification controversy, repeatedly they rested their case upon

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[8] *The Federalist Papers*, *supra* n.7, No. 46, p. 294.

[9] *Id.*, No. 46, pp. 294-95. *See also id.*, No. 17, pp. 118-119 (A. Hamilton) ("the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control" any tendency of Congress to "absorb" the States' "residuary authorit[y]"); No. 31, p. 197.

Madison had made the same argument at the constitutional convention itself:

> In some of the States, particularly in Connecticut, all the Townships are incorporated and have a certain limited jurisdiction. Have the Representatives of the people of the Townships in the Legislature of the State ever endeavored to despoil the Townships of any part of their local authority? As far as this local authority is convenient to the people they are attached to it; and their representatives chosen by and amenable to them (naturally) respect their attachment to this, as much as their attachment to any other right or interest. [I *Records of the Federal Convention*, *supra* n.3 at 357]

To protect the states' ability to compete within the political arena, the framers established certain constitutional safeguards, most notably the provision for a Senate to be composed of two representatives of each State, chosen by the state legislature. Roger Sherman argued for "the equality of votes not so much as security for the small states, as for the state governments," I *id.* at 200. *See also* I *id.* at 155-56 (George Mason).

an estimate of how the political process would actually work.[10]

Finally, in light of the stress that *National League* and the subsequent cases have placed on the Tenth Amendment, we emphasize that nothing in that Amendment was intended to alter the framers' original understanding or to impose new limits on Congress' power. As previously noted—and as this Court has repeatedly stated, *see* pp.

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[10] Scheiber, *supra* n.3, at 89. *See also e.g.*, W. Murphy, *supra* n.2, at 403 ("When the Anti-federalists . . . lamented the lack of *constitutional* limitations on the power of the national government to keep it from overwhelming the state governments, the main answer of the Federalists was to point to those features of the Constitution which afforded *political* limitations on the exercise of national powers") (emphasis in original); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558 (1954) ("For the containment of the national authority, Madison did not emphasize the function of the Court; he pointed to the composition of Congress and to the political processes.").

In *EEOC v. Wyoming*, —— U.S. ——, 103 S. Ct. 1054 (1983), Justice Powell, in dissent, reached a conclusion quite at odds from all of the historians just cited. Pointing to various assertions by the States during the pre-Civil War period of an authority to override federal law—for example, the Kentucky and Virginia resolutions adopted by the legislatures of those States in 1798 to protest the Alien and Seditions Acts and the nullification doctrine expounded by John Calhoun—Justice Powell concluded that these assertions evidenced the framers' intent for "the reserved powers of the States [to] limit[] the delegated powers of the National Government." *Id.* at 1079. But, notably, in the incidents to which Justice Powell referred that was *not* the claim the States made; rather the States claimed that their authority was superior to Federal authority. As Justice Powell ultimately acknowledges in his dissent—and as the Court squarely held in *Texas v. White*, *supra*, on which *National League* ironically relied, *see* p. 20, *infra*—these assertions of state supremacy were not "constitutionally sound," 103 S. Ct. at 1079 n.8; indeed they were the very antithesis of the system the framers had intended to create. As Madison wrote, "[a] plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imagined" than "a nullification of a law of the U.S." by a single State. 9 *The Writings of James Madison* 575 (Hunt ed. 1910).

12-19, *infra*—the language of the Amendment does not permit such a reading. And the "legislative history" of the Amendment is equally clear. Indeed, in proposing the Tenth Amendment at the first Congress Madison explained:

> I find from looking into the amendments proposed by the State conventions that several are particularly anxious that it should be declared in the Constitution that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it. [*History of Cong.* 441 (June 8, 1789)] [11]

Significantly, the only controversy that the Tenth Amendment engendered was over a proposal, recommended by Massachusetts during the ratification process and advanced on three occasions in Congress, to provide that power not "expressly" delegated to the federal government be reserved to the States.[12] "Madison objected to this proposal, because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication unless the Constitution descended to recount every minutiae." *I Annals of Cong.* 790. Madison's position prevailed, and the word "expressly" was not included in the Amendment. Commenting on this history, Justice Story concluded:

> It is plain . . . that it could not have been the intention of the framers of this amendment to give

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[11] During the debate in Virginia over ratifying the Constitution —before the Tenth Amendment had been added—Madison argued that it was "obviously and self-evidently the case that every thing not granted is reserved." III S. Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 565 (1836).

[12] *See* A. Mason, *The States Rights Debate* 94 (1964); W. Murphy, *supra* n.2 at 337 (Massachusetts).

> it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those which are granted. . . . The attempts, then, which have been made from time to time, to force upon this language an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly;" to qualify what is general, and obscure what is clear and defined. [3 J. Story, *Commentaries on the Constitution of the United States* 753-54 (1st ed. 1833)]

C. For over one hundred and fifty years the principles just set forth—that federal power, where it exists, is supreme and that the safeguard for state sovereignty lies in the political process, and not the judicial—prevailed in this Court's decisions concerning the scope of Congress' power under the Commerce Clause. As Justice Brennan in his dissenting opinion demonstrated, and we now recapitulate, *National League* represented a sharp departure from these precedents.

The Court first addressed the subject at length in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In that case Chief Justice Marshall declared the principle that controlled until *National League*:

> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. [*Id.* at 405]

And Chief Justice Marshall stated, too, that the Tenth Amendment was "framed for the purpose of quieting the excessive jealousies which had been excited" and

> declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving

> the question, whether the particular power which might become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair constitution of the whole instrument. [*Id.* at 406]

In *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the Court, again speaking through Chief Justice Marshall, reaffirmed the teaching of *McCulloch*: "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects," and thus Congress' "power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government." 9 Wheat. at 197. Echoing the argument of *The Federalist Papers* as to the source of the limitation on Congress' ability to exercise its enumerated powers the Court declared:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to save them from its abuse. They are the restraints on which the people must often rely solely, in all representational governments. [9 Wheat. at 197]

The principles stated in *McCulloch v. Maryland* and *Gibbons v. Ogden* were consistently followed thereafter by this Court with one possible exception.[13] There was a rela-

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[13] For example, in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), the first Justice Harlan, writing for the Court, rejected the argument that federal regulation of a State-chartered corporation invaded the States' reserved authority under the Tenth Amendment:

> We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress in regulating interstate commerce, must act in subordination to the will of the states when exerting their power to create corporations. No such view can be entertained for a moment.
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> Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all

tively brief period of time during which the Court read Congress' powers under the Commerce Clause quite narrowly; *Hammer v. Dagenhart*, 247 U.S. 251 (1918),

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> the decisions of this court as to the powers of the national government over matters committed to it. [*Id.* at 345]

One year earlier, Justice Harlan, had made the same points in *The Lottery Case*, 188 U.S. 321, 356-57 (1903). *See also e.g., United States v. Harris*, 106 U.S. 629, 636 (1883) ("Whenever . . . a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided."); *In re Rahrer*, 140 U.S. 545, 562 (1891) ("The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge"); *Hoke v. United States*, 227 U.S. 308, 320 (1913) ("The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons *or states* is not material to be considered. It is the supreme law of the land, and persons *and states* are subject to it." (emphasis added); *The Minnesota Rate Cases*, 230 U.S. 352, 399 (1913) (the Constitution reserves to the States "only . . . that authority which is consistent with and not opposed to the grant to Congress."); *United States v. Sprague*, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified."); *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) ("effective restraints on [the commerce clause power's] exercise must proceed from political rather than judicial processes.")

The same principles were consistently applied by the Court in addressing the scope of other powers of Congress. For example, in *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 516 (1938), the Court held that "[i]n view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment." In *Ashwander v. TVA*, 297 U.S. 288, 330 (1936), the Court concluded that "to the extent that the power of disposition is . . . expressly conferred, it is manifest that the Tenth Amendment is not applicable." And in *Sperry v. Florida Bar, supra.* a case involving the patent power, the Court stated:

> Congress having acted within the scope of the powers "delegated to the United States by the Constitution," it has not exceeded the limits of the Tenth Amendment despite the con-

which invalidated a federal child labor law, is the leading case from that era. In that case, the Court buttressed its argument that Congress had exceeded its authority under the Commerce Clause by invoking the Tenth Amendment, *see id.* at 274, 275-76 (although the Court did not there suggest, as *National League* was later to hold, that a law that was a proper regulation of commerce could nonetheless violate the Tenth Amendment).

The *Hammer v. Dagenhart* era was short-lived; in *United States v. Darby*, 312 U.S. 100 (1941) the Court expressly overruled *Dagenhart*, rejecting both its cramped reading of the Commerce Clause, and its misplaced reliance on the Tenth Amendment. With respect to the latter point the Court in *Darby* stated:

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. [312 U.S. at 124]

D. The foregoing cases all involved federal regulation of private individuals, in which a claim was made that Congress had invaded powers reserved to "the people" or

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current effects of this legislation upon a matter otherwise within the control of the State. [373 U.S. at 403]

See also James Everard Breweries v. Day, 265 U.S. 545, 558 (1924).

had infringed upon state sovereignty by overturning state law. The principles developed in those cases were—until *National League*—likewise consistently applied by the Court to federal regulation of the "States as States," no less than to federal laws displacing state regulation of private individuals.

The seminal case is *Sanitary District v. United States*, 266 U.S. 405 (1925). At issue in that case was the power of the federal government to limit the amount of water that the State of Illinois could withdraw from Lake Michigan; Illinois argued that its need was "to take care of the sewage and drainage of Chicago," *id.* at 424, and that "great evils . . . would ensue if the flow were limited," *id.* The Court nonetheless unanimously sustained the federal law. Writing for the Court Justice Holmes noted that Congress had acted pursuant to its authority "to remove obstruction to interstate and foreign commerce," *id.* at 425, and he explained that,

> There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants. In matters where the states may act, the action of Congress overrides what they have done. [*Id.* at 426]

Justice Holmes added: "This is not a controversy between equals." *Id.* at 425. *See also Board of Trustees v. United States*, 289 U.S. 48 (1933) (Hughes, C.J.) (foreign commerce).

The Court returned to the subject in *United States v. California*, 297 U.S. 175 (1936), in which the question was Congress' power to regulate a state-run railroad. The Court, per Stone, J., unanimously sustained that power:

> That in operating its railroad [California] is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to

> regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.* [*Id.* at 183-84; emphasis added]

Justice Stone added that "there is no . . . limitation upon the plenary power to regulate commerce," and that "[t]he state can no more deny the power if its exercise has been authorized by Congress than can an individual." *Id.* at 185. *See also California v. Taylor*, 353 U.S. 553 (1957); *Parden v. R. Terminal Co.*, 377 U.S. 184 (1964).[14]

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[14] In *National League* the Court termed the last quoted sentence from *United States v. California* "dicta," 426 U.S. at 854, and disapproved that sentence as "simply wrong," *id.* at 855. The *National League* Court purported not to disapprove of the "holding" of *California*, which the Court understood as follows:

> There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce. . . ." 297 U.S. at 182. [426 U.S. at 854 n.18]

In fact, however, Justice Stone's opinion for the Court in *California* expressly *declined* to base the decision on the nature of the activity in which the State was there engaged. *See* 297 U.S. at 183 ("we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or its 'private' capacity"); *id.* at 185 (refusing to decide whether operating a railroad is an "activit[y] in which the states have traditionally engaged").

The unanimity of *California* is especially impressive since *United States v. Butler*, 297 U.S. 1 (1936), had been decided just four weeks earlier, and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) was decided later at the same Term. Yet even the Justices who read the Commerce Clause narrowly in *Butler* and *Carter Coal*—four of whom were later to bitterly resist what they regarded to be an unwarranted expansion of the commerce power in *Labor Board v. Jones & Laughlin Corp.*, 301 U.S. 1 (1937)—considered it to be entirely consistent with state sovereignty that the States should be subject to the commerce power to the same extent as private individuals.

Other cases likewise have sustained Congress' power to regulate the States as States. In *Oklahoma v. Atkinson Co.*, 313 U.S. 508 (1941), the Court sustained Congress' power to build a dam which would flood 3,800 acres of state-owned land which was being used by the state "for school purposes, for a prison farm, for highways, rights of way, and bridges." *Id.* at 511. The Court concluded that the issues raised by the State "raise not constitutional issues but questions of policy." *Id.* at 527. In *California v. United States*, 320 U.S. 577 (1944), the Court upheld federal regulation of state-owned waterfront terminals, stating that "it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade . . . whether they be the activities and instrumentalities of private persons or of public agencies." *Id.* at 586. And in *Case v. Bowles*, 327 U.S. 92 (1946), the Court concluded that Congress constitutionally had included the States within the reach of the Emergency Price Control Act, rejecting the State's Tenth Amendment claim on the ground that "the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government.'" *Id.* at 102; *see also id.* at 101.[15]

Finally, in *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court, sustained federal power to apply the Fair Labor Standards Act to state employees. Summarizing the principles that had been developed over the preceding four decades, Justice Harlan stated:

> There is no general "doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise it powers so as not to

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[15] Although *National League* distinguished *Case*'s Tenth Amendment discussion as limited to the war power, *see* 426 U.S. at 854-855, n.18, the *Case* opinion itself states a general proposition disapproving the petitioner's reliance on the Tenth Amendment and nowhere suggests such a distinction. Moreover, the distinction is untenable, as has been clear since *Gibbons v. Ogden*, which equated Congress' commerce and war powers. *See* 9 Wheat. at 197, quoted at p. 13, *supra*.

> interfere with the free and full exercise of the powers of the other.'" *Case v. Bowles*, 327 U.S. 92, 101.
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> • • • •
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> [W]hile the commerce power has limits, valid general regulations of comerce do not cease to be regulation of commerce because a State is involved. If a State is engaged in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the States too may be forced to conform its activities to federal regulation. [*Id.* at 195, 196.]

National League remarkably cites *Wirtz* for the proposition that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." 426 U.S. at 842. But, as unmistakably appears, the assurance that the Court has "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity,'" 392 U.S. at 196, was based on "the constitutional differentiation" between activities which are and which are not "commerce with foreign nations and among the several States," *id.* The distinction between this legitimate constitutional protection for the States, and the doctrine adopted in *National League* was emphasized by Justice Harlan at the conclusion of *Wirtz's* constitutional analysis:

> This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens. [392 U.S. at 198-199]

Justice Harlan's statement that "[t]he Court will not carve up the commerce power" echoes Madison's injunction at the constitutional convention: "the regulation of Com-

merce [is] in its nature indivisible and ought to be wholly under one authority." II *Records of the Federal Convention*, *supra* n.3, at 625.

E. The *National League* opinion not only failed to treat adequately with the abundant precedent which was contrary to the Court's conclusion, but relied heavily on language from decisions which provide no support for that conclusion. We briefly examine those decisions in chonological order.

National League first cited *Texas v. White*, *supra*, 7 Wall. at 725, for the proposition that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." But Chief Justice Chase made that point in *Texas v. White* in the course of answering in the *negative* "the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States." *Id.* at 724. In short, the sentence quoted in *National League* forcefully asserts the incontestable proposition that the Constitution establishes a *federal* system to which the States are irrevocably bound. That sentence says nothing about the respective powers of the Union and of the States in that federal system; Chief Justice Chase spoke to *that* issue in an earlier sentence in the same paragraph:

> Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. [7 Wall. at 725]

Thus, *Texas v. White* did not imply, let alone decide, that Congress' delegated powers must in any way yield to the sovereignty of the States.[16]

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[16] It cannot be denied, however, that even prior to *National League*, *Texas v. White* had been cited for that proposition. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 295 (1936); *Ashton v. Cameron County Dist.*, 298 U.S. 513, 528 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548, 598, 611 (1937) (McReynolds, J., dissenting).

National League next cited *Lane County v. Oregon*, 7 Wall. 71, 76 (1869) for the declaration that "in many articles of the Constitution the necessary existence of the States, and, *within their proper spheres*, the independent authority of the States, is distinctly recognized" (emphasis added). In the *Lane County* opinion the Court elaborated upon the "proper sphere" of the States vis-a-vis the federal government:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. [*Id.*]

The *Lane County* Court also made clear that the States' power to tax its own citizens:

> is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. [*Id.* at 77] [17]

Third, the *National League* Court cited *Coyle v. Oklahoma*, 221 U.S. 559 (1911), which declares that the "power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers." *Id.* at 565. But all that *Coyle* held is that Congress' authority under Article IV § 3 to admit new States into the Union does not empower the national legislature to impose conditions on admission whereby the new State would be on other than an equal footing with the other States, and that therefore Congress exceeded its powers under Article IV, § 3 of the Constitution by limiting Oklahoma's power to determine the location of its state

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[17] In *Florida v. Mellon*, 273 U.S. 12, 17 (1927), Justice Sutherland for a unanimous Court, cited *Lane County*, among other cases, for the rule that:

> Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.

capitol in the Act enabling Oklahoma to become a State. In so construing Article IV § 3 (in accordance with much earlier precedent) the Court performed the function of determining the scope of one of Congress' powers delegated in Article I, in the same manner, for example, as the Court acts in determining what is "commerce" for purposes of Article I, § 8, cl. 3. And *Coyle* expressly recognized that while Congress could not impose a condition on a new State by virtue of its control over admission in Article IV § 3, the national legislature could do so as a regulation of commerce because that would be within Congress' delegated powers.[18]

The *National League* opinion relied also on two tax immunity opinions, both written by Chief Justice Stone: *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926) and *New York v. United States*, 326 U.S. 572 (1946) (plurality opinion). Prior to *National League*, however, that doctrine was considered to be *sui generis*, and to provide

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[18] The Court said:

> It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.
>
> No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capitol of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states. [221 U.S. at 574 (citations omitted)]

no analogy which would create an intergovernmental immunity from exercise of the interstate and foreign commerce power. Chief Justice Stone himself made the point in *United States v. California*, *supra*, 297 U.S. at 185: "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce." [19]

National League does not, to be sure, push the tax immunity analogy to the limits of its illogic. Rather than applying the tax immunity doctrine to all of Congress' Article I power, the Court there "express[ed] no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1," 426 U.S. at 852 n.17, and the Court distinguished *Case v. Bowles*, *supra*, as a "war power" case, 426 U.S. at 854-855, n.18.[20] (The distinction is without basis in the *Case* opinion and is unsound in principle, *see* p. 18 n. 15, *supra*.) The *National League* opinion fails, however, to explain why the intergovernmental tax immunity doctrine should be extended to limit the power to regulate interstate commerce but not to limit other powers delegated in Article I. And extending the doctrine only to the commerce clause power is especially difficult to justify when it is recalled that "[n]o other federal power was so universally assumed to be necessary [as the commerce power], no other state power was so readily relinquished." *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534 (1949). *See also EEOC v. Wyoming*,

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[19] That there are differences between the commerce clause and tax powers has been clear since at least *Gibbons v. Ogden*, *supra*. *See* 9 Wheat. at 199-201.

[20] Subsequently, in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 n.13 (1979), the Court said, "It has never been suggested that Congress' power to regulate foreign commerce could be so limited [as in *National League*]."

supra, 103 S. Ct. at 1054, 1065 (Stevens, J., concurring); *National League*, 426 U.S. at 864-865 n.6 (Brennan, J., dissenting).

National League cited as well *United States v. Jackson*, 390 U.S. 570 (1965), and *Leary v. United States*, 395 U.S. 6 (1969), which held that Congress' exercise of the commerce power is subject to the provisions in the Bill of Rights which in terms limit the powers of the national government. The only constitutional provision on which *National League* rests, however, is the Tenth Amendment (*see* p. 3, *supra*), which does *not*, in terms, limit any of the delegated powers, but is declarative of the principle of federalism that powers which have *not* been delegated to the federal government are reserved to the States or the people.

Fry v. United States, 421 U.S. 542 (1975), the only other decision cited in *National League*, contains a footnote which does broach a broader view of the Tenth Amendment. The Court said that the "Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547 n.7. Since it was not necessary for the decision—the Court followed *Wirtz* and sustained an exercise of the commerce power against the States—the *Fry* footnote did not give further content to that "constitutional policy." And the footnote—in an opinion issued on the same day that *National League* was set for reargument—was truly "*dicta*," which, if intended to give substantive scope to the Tenth Amendment, would be inconsistent with all the precedents discussed at pp. 12-19, *supra*.

F. While as we have just shown the tax immunity doctrine does not justify a commerce clause immunity doctrine, the former does warrant close separate examination, for its history reveals the futility of judicial attempts to impose principled and workable limitations on an enumerated power of Congress.

The rule that States enjoy some measure of constitutional immunity from federal taxation was first announced in *Collector v. Day*, 11 Wall. 113 (1871), in which the Court held that the income of a state judge could not be taxed by the federal government.[21] The Court in that case expressed concerns strikingly similar to those voiced in *National League*: the States "are separable and distinct sovereignties," *id.* at 124, their "unimpaired existence . . . is . . . essential," *id.* at 127, and they "should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax," *id.* at 125-26. Based on those concerns, the Court held that "the means and instrumentalities employed by . . . [state] government to carry into operation . . . their reserved powers" to be "exempt from Federal taxation." *Id.* at 127.

Over the next several decades, the Court searched for principled means to cabin the immunity principle announced in *Collector v. Day* (just as this Court in the past eight years has searched for principled means of limiting *National League*'s regulatory immunity). Specifically the Court attempted to limit the immunity to traditional/governmental, as distinguished from non-traditional/proprietary activities of state governments, and on that basis sustained federal taxes on state-run liquor operations, *South Carolina v. United States*, 199

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[21] There is a certain irony in the holding of *Collector v. Day*. At the constitutional convention—and in the subsequent ratification debates—the issue in dispute with respect to the taxing power was whether the federal government should have authority to tax the people directly; the anti-federalists urged that the federal government's taxing authority should be addressed to the States (as States)—and not to the people—and that authority to tax the people should exist only "in the case of the non-compliance of a State, as a punishment for its delinquency." III *Records of the Federal Convention*, App. A, CLVIII, *supra* n.3, at 205. Indeed, three States, in ratifying the Constitution, called for such a limitation on the taxing power to be added to the Bill of Rights, but those calls were not heeded. *See* W. Murphy, *supra* n.2, at 337, 368, 385.

U.S. 437 (1905); *Ohio v. Helvering*, 292 U.S. 360 (1934); and state-run transit operations, *Helvering v. Powers*, 293 U.S. 214, 225 (1934).[22]

In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), the Court took a large step away from the principle of *Collector v. Day* and the tax immunity doctrine. The holding of *Gerhardt* was narrow enough: the income of employees of Port of New York Authority, a bi-state corporation created by compact between two states, was subject to federal taxation. But the reasoning of *Gerhardt* represented a striking retreat from *Collector v. Day*:

> There are cogent reasons why any constitutional restriction upon the taxing power granted to Congress, so far as it can be properly raised by implication, should be narrowly limited. One . . . is that the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which

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[22] The Court likewise recently has stated that "[i]t is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities." *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, —— U.S. ——, 103 S. Ct. 1011, 1014 n.6 (1983); *see also Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 685 n.11 (1982) ("the running of a business enterprise is not an integral operation in the area of traditional government functions"); *Reeves Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants"). And, of course, the *National League* holding is limited to "traditional operations of state and local governments." 426 U.S. at 851 n.16. *See, e.g., Transportation Union, supra*, 455 U.S. at 686 (sustaining federal regulation of labor management relations of state-owned railroad because "the operation of railroads is not among the functions *traditionally* performed by state and local governments" (emphasis in original).

We discuss the problems this limitation poses *infra* at pp. 36-37.

> provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.
>
> Another reason [for limiting tax immunity] rests upon the fact that any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. [304 U.S. at 416]

One year later, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), expressly "overruled" *Collector v. Day* "so far as [it] recognize[d] an implied constitutional immunity from income taxation of the salaries of officers or employees of . . . a state government or [its] instrumentalities." *Id.* at 486. The Court reaffirmed the teaching of *Gerhardt* "that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted." *Id.* at 483. And the Court concluded that the fact that at least part of "the burden of a non-discriminatory general tax upon the incomes of employees of a government . . . may be passed on economically to that government, through the effect of the tax on the price level of labor or materials," *id.* at 487, is an insufficient basis for finding an infringement of sovereignty.

New York v. United States, 326 U.S. 572 (1946), represents a still further retreat. The Court there sustained the application to New York of a tax on the sale of mineral water, and in so doing rejected as "untenable" the distinction previously drawn between traditional/governmental and nontraditional/proprietary state functions. *Id.* at 586 (Stone, J., concurring); *see id.* at 580 (Frankfurter, J.). Justice Frankfurter explained:

> To rest the federal taxing power on what is "normally" conducted by private enterprise in contradiction to the "usual" governmental function is too shift-

> ing a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. [*Id.* at 580] [23]

Finally, in *Massachusetts v. United States*, 435 U.S. 444 (1978), the most recent tax immunity decision, the Court, while divided over what, if anything, remains of the tax-immunity doctrine, concluded that "[a] nondiscriminatory taxing measure that operates to defray the cost of a federal program by recovering a fair approximation of each beneficiary's share of the cost"—in that case a registration tax on aircraft—is plainly constitutional as applied to the States. *Id.* at 460. The Court acknowledged that application of the tax to the State "will increase the cost of the state activity," but the Court reaffirmed that "an economic burden on traditional

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[23] Justice Frankfurter put the point this way in his opinion for the Court a few years later in *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955): the governmental-proprietary distinction is "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."

Although the Court in *New York v. United States* agreed on the inadequacy of the prior lines that had been drawn to define the States' tax immunity, the Court was unable to arrive at a majority position as to a new line. In his opinion announcing the judgment of the Court, Justice Frankfurter urged that the appropriate rule was that "so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." 326 U.S. at 582. Justice Stone, in a concurring opinion which three other Justices joined, argued that Justice Frankfurter's nondiscrimination principle was insufficiently protective of state sovereignty because that principle might permit

> a general non-discriminatory real estate tax . . . or an income tax laid upon citizens and States alike [to be] applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands . . . . [*Id.* at 587-88]

Justice Stone concluded that such hypothetical taxes would be unconstitutional because they would "unduly interfere[] with the performance of the State's functions of government." *Id.*

state functions without more is not a sufficient basis for sustaining a claim of immunity." *Id.* at 461.[24]

The tax immunity cases teach two lessons that are especially relevant here. First, of course, those cases highlight the difficulty of the task the Court attempted in *Collector v. Day* with respect to the taxing power and in *National League* with respect to the commerce clause power: imposing principled and workable limits—not contained in the Constitution itself—on an enumerated congressional power. Second, and equally important, the experience with federal taxation of the States confirms the wisdom of the point that Madison made in *The Federalist Papers*, and that the Court made in *Helvering v. Gerhardt*, *supra*: "the usual processes of political action . . . provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands" of the national and state governments. *Gerhardt*, *supra*, 304 U.S. at 416. For the fact of the matter is that, during the almost 80 years prior to *Collector v. Day*, the 70 years that decision was good law, and, the almost 40 years since *New York v. United States* left the law in this area uncertain, the *only* federal taxes Congress ever has enacted that this Court has found to be unduly intrusive on state sovereignty were taxes on the income of state

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[24] Contrast the teaching quoted in text from *Massachusetts v. U.S.* and from *Graves v. New York* (at p. 27, *supra*) with the Court's attempt in *EEOC v. Wyoming*, *supra*, to distinguish *National League*:

> The most tangible consequential effect identified in *National League of Cities* was financial: forcing the States to pay their workers a minimum wage and an overtime rate would leave them with less money for other vital state programs. . . . In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances. [103 S. Ct. at 1062-63]

The dissent in *EEOC v. Wyoming* argued that a principal constitutional vice in the application of the ADEA to the States was the economic burden placed upon the States. *See id.* at 1070-71 (Burger, C.J., dissenting).

employees, and not even the most ardent advocate of state sovereignty would any longer contend that such nondiscriminatory income taxes are unconstitutional. Congress' prudence in exercising the taxing power demonstrates the wisdom of Justice Frankfurter's caution:

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. [*New York v. United States*, *supra*, 326 U.S. at 583]

The ultimate message of the tax immunity cases, then, is that, as Madison predicted, the political process provides a more than adequate check on Congress and that the judicial process is not competent to provide additional restraints on Congress' exercise of its enumerated powers.[25]

G. This conclusion is confirmed by a close analysis of the decision in *National League* itself. For the limitations that the Court placed on the rule of immunity there announced further demonstrate that, in Justice Frankfurter's words:

> Any implied limitation upon the supremacy of the federal power . . . brings fiscal and political factors into play. The problem cannot escape issues that do

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[25] As one commentator has persuasively observed:

> The ultimate issue is not whether the national political process protects federalism interests perfectly. Indeed, in the nature of things mistakes inevitably will be made. The real question is whether judicial intervention is likely to rectify those mistakes without multiplying them. If state interests could be identified objectively we might be able to say with confidence that Congress had ignored a real state interest, and that therefore a judicial role would not entail great risks. But . . . it seems that the risk of judicial error is quite high in light of difficulties in devising appropriate doctrines limiting Congress' power.

Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 U.C.L.A. L. Rev. 1301, 1335 (1978).

> not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. [*New York v. United States*, *supra*, 326 U.S. at 581]

The first limitation of *National League* was announced in the second paragraph of the Court's analysis in that case: notwithstanding any concerns of state sovereignty, Congress is empowered to enact laws that override (*i.e.*, preempt) "express state law determinations." 426 U.S. at 840; *see id.* at 845. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981), the Court developed the point further:

> Although such congressional enactments obviously curtail or prohibit the States' prerogative to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.[26]

Yet in elaborating *National League* the Court has recognized that "'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty. . . . Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (citations omitted). The upshot is that under what one commentator terms "the curious doctrine of *National League of Cities*," [27] the State is not acting "as a State"—and hence is subject to being overridden by Congress—

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[26] *See also Fidelity Federal S&L Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail").

[27] Alfange, *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 Sup. Ct. Rev. 215, 228-29, 232 (1983). *See also* L. Tribe, *American Constitutional Law* 311-12 (1978); Tushnet, *supra* n.25, at 1340.

when engaging in a "quintessential" exercise of sovereignty, but is acting as a State, and is immune from federal regulation, when fixing the wages of its employees.[28]

The second limitation on *National League* results from the Court's distinction of its decision one Term earlier in *Fry v. United States*, *supra*, which had sustained Congress' power to temporarily freeze the wages of state and local government employees. The *National League* Court explained that the ceiling on wages produced by the freeze at issue in *Fry* was constitutionally different from the floor established by the FLSA because the wage freeze "was occasioned by an extremely serious problem," "displaced no state choices as to how governmental operations should be structured," and "operated to reduce the pressures upon state budgets rather than increase them." 426 U.S. at 853.[29] On similar grounds, the Court in *EEOC v. Wyoming*, *supra*, sustained the application of the Age Discrimination in Employment Act to state employees performing what the Court viewed to be "clearly a traditional state function," 103 S. Ct. at 1062, as the Court found that "the degree of federal intrusion" involved in precluding the States from basing their employment decisions on the age of employees (or applicants for employment) "is sufficiently less serious" than the intrusion involved in requiring the States to pay at least minimum

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[28] Of course in many States the fixing of public employee wages is done by legislation, and thus *National League* necessarily exalts for Supremacy Clause purposes some state laws over others.

[29] The force of the latter distinction is considerably undermined because *National League* did "not believe [that] particularized assessments of actual impact are crucial to resolution of this issue . . . ." 426 U.S. at 851. This was said to be so because the FLSA amendments in any event "significantly alter[ed] or displace[d] the States' abilities to structure employer-employee relationships . . . ." *Id.* But the statute at issue in *Fry* significantly interfered with such structuring because, as was pointed out on petitioners' side in that case, a wage freeze undermines the States' ability to recruit employees and thereby seriously and adversely affects the quality of government operations.

wages to state employees "so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States. . . ." *Id.*

As Professor Alfange aptly observes, under this approach to the Tenth Amendment questions of constitutionality necessarily turn on whether, in the view of the judiciary, "Congress is imposing unnecessary or unjustified requirements on the states," Alfange, *supra* n.27, at 266-67, just as under *Lochner v. New York*, 198 U.S. 45 (1905), constitutional questions turned on whether, in the judiciary's view, burdens on individuals were "unnecessary or unjustified." This approach thus is "a vehicle by which the Court, in the guise of constitutional law, can replace policy determinations of Congress concerning interstate commerce with [policy determinations of] its own," Alfange, *supra* n.27, at 267.[30]

H. For all of the foregoing reasons we respectfully submit that the Court should overrule *National League*

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[30] *See also* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 848 (1979) (*National League* "articulates no principles of sufficient generality to aid lawmakers or lower federal courts in testing federal regulations of state activity"); Cox, *Federalism and Individual Rights Under the Burger Court*, 73 Nw. L. Rev. 1, 22 (1978) (*National League* "reveal[s] nothing beyond the Court's willingness to grant the states immunity from federal regulation entailing what five Justices consider an unduly burdensome increase in the cost of state and local government").

Justice Stevens made the point best in his concurring opinion in *EEOC v. Wyoming, supra*:

> My conviction that Congress had ample power to enact this statute, as well as the statute at issue in *National League of Cities*, is unrelated to my views about the merits of either piece of legislation. . . . My personal views on such matters are . . . totally irrelevant to the judicial task I am obligated to perform. There is nothing novel about this point—it has been made repeatedly by more learned and more experienced judges. But it is important to emphasize this obvious limit on the proper exercise of judicial power, one that is sometimes overlooked by those who criticize our work product. [103 S. Ct. at 1068]

and hold that Congress' commerce clause power is not subject to any constitutional limits derived from state sovereignty. Only such a holding would be faithful to the framers' intent. Pp. 5-12, *supra*. Only such a holding would accord with this Court's jurisprudence for the one hundred and fifty years preceding *National League*. Pp. 12-19, *supra*. Only such a holding would resolve the tensions just noted in the doctrine the Court has formulated. And only such a holding would enable the Court to escape the task which, we submit, experience teaches is inherently incapable of judicial resolution: that of reading into the Constitution an "affirmative limitation," 426 U.S. at 841, on the "manner" in which Congress "exercis[es] the authority" granted it by the Commerce Clause," *id.* at 845.[21]

II. EVEN IF *NATIONAL LEAGUE* WERE CORRECT IN HOLDING THAT STATE SOVEREIGNTY PLACES A LIMIT ON THE COMMERCE CLAUSE POWER, THE EXTENT OF THE LIMIT ESTABLISHED BY *NATIONAL LEAGUE* SHOULD BE RECONSIDERED

Even if, contrary to what we have just shown, the Court were to conclude that *National League* is sound in recognizing a state-sovereignty limit on the commerce power, we respectfully suggest that the extent of the limitation established by that case should be reconsidered. For as we now show, in all events it is clear that the Court in *National League* erred (A) by equating state sovereignty with the State's provision of goods and services, and (B) by equating the States with their political subdivisions.

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[21] This is the conclusion urged by Alfange, *supra* n.27, and Tushnet, *supra* n.25. Professor Cox reaches essentially the same conclusion, but with one caveat: "Judicial second-guessing of *nondiscriminatory* regulation is not necessary in order to protect the existence and effective functioning of the states against destruction at the hands of the national government." Cox, *supra* n.30, at 25 (emphasis added). And thirty years ago, Professor Wechsler reached a similar conclusion: "Federal intervention as against the states is . . . primarily a matter for congressional determination in our system as it stands." Wechsler, *supra* n.10, 559.

A. The Provision of Goods and Services Is Not an Essential Part of State Sovereignty

1. In *National League* the Court, after concluding that considerations of state sovereignty limit the commerce power, stated that "[t]he question we must resolve" is whether determining the wages and hours of work of state employees "are ' "functions essential to separate and independent existence," ' so that Congress may not abrogate the States' otherwise plenary authority to make them." 426 U.S. at 845-46 (citation omitted). The Court answered that question as follows:

> [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. [426 U.S. at 852]

And *Maryland v. Wirtz* was overruled because the *National League* Court "agree[d] that such assertions of [federal] power [as were entailed in the application of the FLSA to the States] would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty.' " 426 U.S. at 855.

The stated rule of *National League* thus is that Congress may not threaten the States' "separate and independent existence," "impair the States' 'ability to function effectively in a federal system,' " or "devour the essentials of state sovereignty." [32] But that rule does not

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[32] Subsequent cases have reaffirmed that this is the intended scope of the limit on Congress' power. *See, e.g., Transportation Union v. Long Island R. Co., supra*, 455 U.S. at 687 (Congress may not "hamper the State government's ability to fulfill its role in the Union"); *EEOC v. Wyoming, supra*, 103 S. Ct. at 1060.

in itself require that application of the FLSA to some or all state employees providing goods and services is invalid; it is not intuitively obvious that requiring the States to abide by the labor protections for such employees stated in the FLSA would, for example, "devour the essentials of state sovereignty," let alone jeopardize the "separate and independent existence" of the States. That conclusion follows only if it is agreed that provision of goods and services is an essential of state sovereignty or state existence.

The Court in *National League* was not prepared to go quite that far. To rationalize its holding with the Court's precedents permitting federal regulation of state-owned railroads, *see* pp. 16-17, *supra* (including federal regulation of the labor-management relations of such railroads) —and, moreover, to assure that the States' immunity from federal regulation would not be ever-expanding as the States assumed new functions—the *National League* Court limited its conception of state sovereignty to the provision of only "traditional," 426 U.S. at 851, or "integral," *id.* at 854 n.18, services, and permitted federal regulation of the employment conditions of state employees engaged in the performance of other state functions.[33]

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[33] In light of this limitation, it is clear that, despite some dictum in the opinion, *National League* does not mean that establishing the wages of the employees the State hires is an essential attribute of state sovereignty; rather, under *National League*, that is true with respect to only certain employees, and it is true about those employees only because they are engaged in functions which the Court determined to be essential to the State and whose performance the Court determined could be disputed by the application of the FLSA.

Even as to those services with respect to which *National League* recognized a state immunity from federal regulation, the Court in *National League* was not prepared to hold that immunity to be absolute; thus the Court based its holding, in part, upon the degree of intrusion that it believed application of the FLSA would cause. As previously noted, the limitation on *National League* to especially intrusive federal laws is itself problematic. *See* pp. 32-33, *supra*.

As the commentators have observed, this limitation on the reach of *National League* underscores an anomaly in the doctrine announced in that case:

> [I]t is difficult to understand how a distinction drawn by a federal court between what could be described as nontraditional services (subject to federal control) and traditional services (not subject to federal control) would not itself make a severe inroad into a state's "sovereign perogative of choice." . . . On the other hand, if "traditional" is redefined to mean "important" or "essential" the concept becomes boundless.[34]

Precisely because this is so the debate in this case comes down to whether state-operated buses and subways are constitutionally distinguishable from state-operated commuter trains.

This difficulty suggests that even if the Court were to continue to limit Congress' commerce clause power so as to protect state sovereignty, there would be a need to reconsider the question of to what extent, if at all, the States must be permitted to provide goods and services free and clear of federal commerce clause regulation in order to preserve the essentials of state sovereignty.

2. In addressing that question it is important to bear in mind, at the threshold, that the concept of "state sovereignty" is not self-defining. The word "sovereignty" ordinarily connotes a single, supreme government—a nation-state. Within the unique federal system that the framers created, however, state sovereignty cannot have that meaning, for within that system there is a national government which is preeminently the sovereign and

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[34] Alfange, *supra* n.27, at 233-34. *See also* L. Tribe, *supra* n.27, at 311; Kaden, *supra* n.30, at 887; Tushnet, *supra* n.25, at 1339; La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash. U.L.Q. 779, 95 (1982).

whose laws are the "supreme law of the land."[35] Thus the term "state sovereignty" must be defined *ab initio* with specific reference to the unique federal system created by the Constitution. As the Court stated in *EEOC v. Wyoming*:

> The principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a "separate and independent existence" not be lost through undue federal interference in certain core state functions. [103 S. Ct. at 1060]

One of the "unique benefits of [this] federal system" is the existence of a supreme power in the federal government to insure a free flow of commerce, "to enact 'all appropriate legislation' for 'its protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564), [and] to

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[35] For precisely that reason, a number of delegates at the constitutional convention urged that it was misleading even to speak of the States as sovereigns. For example, Rufus King of Massachusetts argued as follows:

> The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign. They had not even the organs or faculties of defense or offense, for they could not of themselves raise troops, or equip vessels, for war. [1 *Records of the Federal Convention*, *supra* n.3, at 323]

Madison himself likewise argued:

> Some contend that states are sovereign, when in fact they are only political societies. There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The states never possessed the essential rights of sovereignty. These were always vested in congress. . . . The states, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation. [1 *Id.* at 471]

adopt measures 'to promote its growth and insure its safety' (*Mobile County v. Kimball*, 102 U.S. 691, 696, 697) . . . ." *Labor Board v. Jones & Laughlin Steel Corp.*, *supra*, 301 U.S. at 36-37. Indeed, "the need for centralized commercial regulation was universally recognized as the primary reason for preparing a new constitution." Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335, 1340-41 (1934). *See also* pp. 23-24, *supra*. Whatever meaning is given to the concept of "state sovereignty," therefore, that concept should not be such as to defeat the point of the Commerce Clause.

3. There is no doubt that when the States create goods or services they are engaged in economic activity that can powerfully affect interstate commerce.[36] The Court at least implicitly acknowledged the point in *National League*, *see* 426 U.S. at 840-41, 845, and developed the point at some length in *Maryland v. Wirtz*, *supra*, with respect to the state-operated schools and hospitals at issue in that case:

> It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States. For example:
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> > In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. . . .[37]

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[36] In 1982, for example, over 10% of the gross national product—$363,400,000,000—was accounted for by governments at all levels. Government purchases accounted for over 20% of the GNP—$649,000,000,00. *See 1984 Statistical Abstract of the United States* at 449-50.

[37] For the year 1981, the comparable figure for hospitals was $17.6 billion; for 1983, the comparable figure for schools, was $135.9 billion. *1984 Statistical Abstract of the United States* at 113, 139.

> For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases.
>
> Similar figures were supplied for other States. [392 U.S. at 194-95]

Defining state sovereignty to include such economic activities—and thereby denying Congress the power to adopt such regulations as the national legislature deems necessary to protect the flow of commerce—thus jeopardizes, rather than furthers, one of the "unique benefits of our federal system." [38]

While we do not believe it either wise or necessary to categorize the mischief that will ensue from hobbling Congress' power to regulate commerce by denying what commerce is—a cunningly interrelated complex constantly in the process of change—we do pause to repeat one point noted in our brief last Term. If the States as providers of goods and services were immune from federal regulatory authority, the Tenth Amendment would create a powerful incentive for transferring business enterprises from private to public ownership. Federal regulation, in the interest of other social objectives, often imposes costs on the operation of a private good or service producing entity, as the instant case and *National League* both illustrate. If those costs could be avoided merely by state

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[38] As the discussion in text indicates, our argument here is limited to situations like that posed by the FLSA in which Congress regulates the States in common with other entities engaged in the same activity. As Professor Cox observes, "[r]egulation aimed only at state activities would present a quite different question." Cox, *supra* n.30, at 25. *See also* n.23, *supra* (discussing Justice Frankfurter's opinion in *New York v. United States*).

acquisition of a business, it would become economically advantageous for the States to acquire and operate business enterprises free of the federally-imposed costs. Yet plainly the Tenth Amendment was not intended to encourage a state take-over from the private sector of the provision of goods and services.

4. There is another, equally fundamental reason for concluding that, in general, state provision of goods and services is not one of "the essentials of state sovereignty." In contrast to the making and enforcement of laws—which is the exclusive province of government (and the "quintessential attribute of sovereignty," *FERC v. Mississippi*, *supra*, 456 U.S. at 761)—when providing a good or service a State does act, contrary to the assertion in *National League*, 426 U.S. at 849, like the other "factor[s] in the 'shifting economic arrangements'" for providing that good or service. States run schools, hospitals, parks and the like, but so do private for-profit and not-for-profit entities.[39] From the perspective of the employees engaged in delivering these services; the manufacturers, sellers and transporters of goods used in creating the services; and the ultimate consumers of the service, the service is very much the same whether supplied privately or publicly. The practice of medicine in public and private hospitals is the same, the suppliers of both institutions are the same, and both draw on the same corps of trained medical personnel. The parallels between public and private educational institutions are equally close—indeed these are the common source of the trained personnel employed by public and private hospitals. In sum, in Justice Frankfurter's phrase, the provision of services does not "partake of uniqueness from the point of view of intragovernmental relations." *New York v. United States*, *supra*, 326 U.S. at 582.

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[39] For an elaborate demonstration of this point, *see* the brief appellee San Antonio Metropolitan Transit Authority filed in this case last Term, pp. 35-38. *See also* Brief of American Public Transit Association at 25 n.33.

Furthermore, no law of nature, no political principle, and no rule of economics determines which goods and services will be produced by the State and which will not. The range of options open to the States is wide; it includes: leaving production to private enterprises; regulating the private sector's production of the good or service; providing financial assistance to would-be-purchasers of the good or service (this assistance may be limited by a means-test or may be in the form of vouchers distributed to all individuals); licensing one or more private entities to create the good or service; subsidizing production of the good or service by private entities; or providing the good or service through government employees.[40]

There is no theory—certainly none enshrined in the Constitution—that explains why, in our society, governments generally have chosen not to be involved in, *e.g.*, the production and distribution of what are undoubtedly two of the most important goods of all, food and clothing, but frequently have chosen to run, *e.g.*, golf courses and zoos. Moreover, as to many services, different governments, at different times, have made different choices: services that in some localities are provided by the government itself in other localities are provided by a private entity pursuant to a contract with the government or by private entities operating in a competitive market. And even in a single locality different options may be tried and retried over time.[41]

The example of refuse collection, perhaps the most mundane of *National League's* "traditional" functions,

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[40] *See, e.g.*, E. Savas, *Privatizing the Public Sector* 55-75 (1982); H. Hatry, *A Review of Private Approaches for Delivery of Public Services* (1983).

[41] *See* sources cited n.40, *supra*. In this regard it is noteworthy that recently it has become increasingly common for governments to contract with a private entity to provide a particular service to the government's citizens rather than for the government to provide that service itself. *See* AFSCME, *Passing the Bucks: The Contracting Out of Public Services* 10-11 (1983).

see 426 U.S. at 851, serves to illustrate our point. The manner in which this service is delivered varies greatly from place to place. In some cities, the government itself provides the service. In other cities, the government contracts with a private firm to do the work at government expense. On the West Coast, it is common for the city to award a territorially exclusive franchise to a private firm which bills the households it serves for its service. And in a number of communities, the free market is relied upon to provide this service on a competitive basis. Indeed, of the various options outlined above "only the voucher system is not utilized to provide [refuse] service in the United States." [42]

Given the range of choices for providing goods and services recognized in this society it simply cannot be said as a general matter that providing goods and services is an "essential" of state sovereignty. The fact that, as to any given good or service, some entities that are *not* sovereign provide the service while some entities that *are* sovereign do not, demonstrates that such activity is not an essential attribute of state sovereignty. Without doubt, a State that provided no services whatsoever would still be a State. So long as the State's authority and discretion to make and enforce laws (within the realm open to it under the Constitution) is not hindered, the State's sovereignty is secure and its "ability to function effectively in a federal system" and "to fulfill its role in the Union" (p. 35, *supra*), is not impaired.

For all of these reasons we submit that, at the least, the Court should limit *National League* so that it restricts Congress' commerce clause power only as necessary to protect that which *FERC v. Mississippi* teaches is the "quintessen[ce]" of state sovereignty: the making and enforcement of laws.

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[42] E. Savas, *supra* n.40, at 71-72. Surveys have indicated that upwards of 30% of cities contract out for solid waste collection. AFSCME, *supra* n.41, at 10.

B. Federal Regulation of Political Subdivisions Does Not Infringe State Sovereignty

In *National League*, the Court invalidated the FLSA insofar as it applied not only to State employees engaged in "traditional" or "integral" functions, but also insofar as it applied to employees of cities, counties, and other political subdivisions engaged in such functions. The sole basis for this aspect of the ruling was set forth in a footnote:

> As the denomination "political subdivision" implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself. [426 U.S. at 855-56, n.20]

The foregoing is fundamentally unsound. Its fallacy is perhaps best revealed by *Community Communcations Co. v. Boulder*, 455 U.S. 40 (1982), in which the Court rejected a city's argument that its "cable television moratorium ordinance is an 'act of government' performed by the city *acting as the State* in local matters, which meets the 'state action' criterion of *Parker* [*v. Brown*, 317 U.S. 341 (1943)]." 455 U.S. at 53; emphasis in original. The Court concluded that this argument

> both misstates the letter of the law and misunderstands its spirit. The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "*dual* system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with

> the Government of the United States, or [with] the States of the Union. *There exists within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in subordination to one or the other of these." *United States v. Kagama*, 118 U.S. 375, 379 (1886) (emphasis added).

> The dissent in the Court of Appeals correctly discerned this limitation upon the federalism principle: "We are a nation not of 'city-states' but of States." [455 U.S. at 53-54]

This same understanding is reflected in this Court's decisions interpreting the Eleventh Amendment. That Amendment, to a greater extent than the Tenth Amendment,[43] "embodies" the "principle of state sovereignty," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), for "immunity from suit is a high attribute of sovereignty," *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911). Yet the Court has never concluded that state sovereignty considerations require that the immunity established by that Amendment extend to political subdivisions; to the contrary, "the Court has consistently *refused* to construe the Amendment to afford protection to political subdivisions such as counties and municipalities . . . ." *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 401 (1979) (emphasis added); *Mt. Healthy Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Old Colony Trust Co. v. Seattle*, 271 U.S. 426 (1926); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).[44] And it is

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[43] The Eleventh Amendment is a quite explicit restriction on the power of the federal government (specifically the power of Congress under Article III to vest certain jurisdiction in the federal courts) whereas the Tenth Amendment limits federal power, if at all, only by implication.

[44] In *Lincoln County*, the Court refused to extend the Eleventh Amendment's protections beyond States, although on the same day

entirely impermissible to treat the Tenth Amendment as giving the word "State" a broader meaning than that word has in the Eleventh, or to hold that political subdivisions share in the States' "sovereignty" for Tenth Amendment purposes although not for the purposes under the Eleventh.

CONCLUSION

For the foregoing reasons, and those stated in our briefs last Term, the judgment of the district court should be reversed.

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(March 3, 1980), in *Hans v. Louisiana*, 134 U.S. 1, the Court expanded that Amendment beyond its literal language to foreclose federal jurisdiction over a suit against the State by one of its own citizens.

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JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1913

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

No. 82-1951

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION AND SUMMARY OF ARGUMENT

This supplemental brief is filed in response to the Court's request that the parties address the question "[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), should be reconsidered." We believe that some clarification of the test for intergovernmental immunity established in *National League of Cities* and subsequent cases is desirable, so

as to lay to rest prevalent misconceptions about the rule established. But the key principle articulated in *National League of Cities* is sound and enduring constitutional doctrine. That is, we agree that the federal commerce power may not be exercised directly to regulate state activity in a manner that would "hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 687 (1982) (quoting *National League of Cities*, 426 U.S. at 851). This modest limitation upon the commerce power is the necessary consequence of the federal structure of our constitutional system and fits comfortably within the context of this Court's decisions on other aspects of federal-state relations.

The prevailing test for assessing claims of state immunity from federal Commerce Clause legislation is, in our view, generally satisfactory. Several points, however, may profitably be clarified. First, the role of the courts in this area is inherently a limited one. Only when Congress ignores the values behind federalism and nullifies state prerogatives in performing core functions may its Acts be set aside. Second, the standard by which it is determined whether particular state activities are protected must be essentially an historical one. In reaching this conclusion, we do not envision a frozen list of protected state activities. Rather, the test must be whether, at the time the federal government first entered the field with regulatory legislation, the states had generally established themselves with fixed patterns of organization as providers of the particular service. Absent such a long-standing tradition of state activity in a field, federal regulation simply cannot be said impermissibly to trench upon state prerogatives.

These principles require reversal of the judgment of the district court. There can be no serious claim that the states had generally undertaken to provide public transit service before the enactment of federal legislation governing employment relations in transit or wages and hours in the labor market generally, or even by the time the Fair Labor Standards Act was applied to public transit employees. The major shift to the public sector occurred instead in the wake of a program of massive federal financial assistance for public transit undertakings. It would therefore be a one-sided federalism indeed that would place employees of publicly-owned transit systems beyond the reach of nondiscriminatory federal wage and hour legislation.

ARGUMENT

I

1. Ours is a federal constitution and a federal system. The federal principle of division of authority between the national government and the states is imbued in both the constitutional text, which recognizes the states as enduring units of government, and in the overall structure of the national charter. The Tenth Amendment, which declares that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," announces the principle directly. The national government, although supreme within its constitutional domain under the Supremacy Clause, is one of delegated (albeit broad and far-reaching) powers. See *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). The states, by contrast, are the presumptive holders of powers not otherwise allocated in the constitutional regime. The vitality of the states as functioning

members of this partnership of governments is thus an essential feature of the scheme.

The Court said in *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975), that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." The Tenth Amendment demonstrates that "our Federal Government is one of delegated powers" (*National League of Cities* v. *Usery*, 426 U.S. at 861 n.4 (Brennan, J., dissenting)) and that the states must remain vital organs of general government. The principle of intergovernmental immunity, stripped to its essentials, is a means of preservation of that structure of federal-state coexistence. The Constitution, read as a whole, necessarily presupposes the existence of, and thus requires the protection of, some sphere of autonomy for the states in the conduct of their own core operations.

But the Tenth Amendment is only the most obvious textual manifestation of the federal principle and of the enduring role assigned to the states in our system of government. Others abound. As the Court said in *Collector* v. *Day*, 78 U.S. (11 Wall.) 113, 125 (1870), "in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized." The Eleventh Amendment, for instance, confirms a limitation upon the judicial power of the United States, exemplifying a broader principle of state sovereign immunity located in the Constitution. See *Pennhurst State School & Hosp.* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 7-8 & n.8. Article VII, prescribing the procedure for placing the new Constitution in operation, and Article V, governing ratification of subsequent amendments, reflect the states' role as delegator of author-

ity under our constitutional system. Article IV, Section 3, establishes the territorial inviolability and indivisibility of the states, precluding their fragmentation or consolidation by Congress without the consent of the states concerned. Cf. *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845) (equal footing doctrine).

The intended role of the states as repositories of legitimate authority in the federal scheme is also demonstrated by the many responsibilities assigned to the states in the establishment of the legislative and executive branches of the federal government. See *Collector* v. *Day*, 78 U.S. (11 Wall.) at 125. Representatives to the House of Representatives are "apportioned among the several States which may be included within this Union" (Art. I, § 2, Cl. 3; see also Amend. XIV, § 2). Senators are apportioned, two to each state (Art. I, § 3, Cl. 1). Of course, the Seventeenth Amendment substituted direct election for selection of senators by state legislatures. But a more fundamental recognition of the political permanence of the states, the legacy of the "Great Compromise" that made possible the success of the Constitutional Convention, remains: "no State, without its Consent [may] be deprived of its equal Suffrage in the Senate" (Art. V).

States were also assigned a key role in the mechanism for selection of the President. Both the composition of the electoral college, in which electors are allocated to the states in proportion to their overall representation in the House and Senate, and the method of selection of electors, which is left to the discretion of the individual states (Art. II, § 1, Cl. 2), reaffirm that the national government was meant to draw its authority from the states. And this point is underscored by the constitutional provision for selec-

tion of a President when no candidate garners a majority of the electoral college: a poll of the House of Representatives, the delegation of each state collectively exercising one vote, with "a majority of all of the states * * * necessary to a choice" (Amend. XII).

2. The decisions of this Court in a number of contexts that may otherwise seem unrelated reflect the protection afforded by the Constitution to core aspects of state sovereignty. More than a century ago, in *Collector* v. *Day*, *supra*, the Court recognized "[t]hat the existence of the States implies some restriction on the national taxing power" as applied to state instrumentalities. *Massachusetts* v. *United States*, 435 U.S. 444, 454 (1978) (opinion of Brennan, J.).[1] The partial immunity of state instrumentalities from federal taxation is "implied from the nature of our federal system and the relationship within it of state and national governments." *United States* v. *California*, 297 U.S. 175, 184 (1936). And that immunity is not limited to federal taxation that discriminates against states, but extends generally to taxation that "unduly interferes with the State's function of government." *New York* v. *United States*, 326 U.S. 572, 588 (1946) (Stone, C.J., concurring). See also *Massachusetts* v. *United States*, 435 U.S. at 456-460 (opinion of Brennan, J.).

This Court has also employed the federalism principle as a pole star in defining the jurisdiction of the federal courts and delineating the proper exercise thereof. For example, the Court has discerned a

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[1] While the rule applied in *Collector* v. *Day*,—*i.e.*, that a state's intergovernmental immunity from federal taxation extends to its officers—has since been overruled, see *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939), the doctrine of immunity survives as to state instrumentalities themselves.

sovereign immunity limitation upon the judicial power conferred on the United States by Article III, see *Pennhurst State School & Hosp.*, slip op. 7-8, explaining that the Eleventh Amendment is "but an exemplification" of a more "fundamental rule." *Ex parte New York*, 256 U.S. 490, 497 (1921). Indeed, the Court has relied on notions on federalism to restrict the power of the federal courts even in cases properly within their jurisdiction. In *Younger* v. *Harris*, 401 U.S. 37 (1971), the Court held that, absent extraordinary circumstances, federal courts should not enjoin an ongoing state criminal proceeding, explaining that the ruling reflected (*id.* at 44)

> a proper respect of state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

The Court added (*id.* at 44-45) that the doctrine of "Our Federalism"

> does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, oc-

> cupies a highly important place in our Nation's history and its future.

See also *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423, 431-432 (1982) (*Younger* applies to noncriminal state proceedings where "important state interests are involved"). Similar policies are reflected in the *Burford* abstention doctrine, which limits the role of federal courts where assumption of jurisdiction would disrupt establishment of coherent state policy in matters subject to state law (*Burford* v. *Sun Oil Co.*, 319 U.S. 315, 318 (1943); *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814-815 (1976)), and in the limitations upon the exercise of federal habeas corpus power to review state convictions, see *Reed* v. *Ross*, No. 83-218 (June 27, 1984), slip op. 8-9; *Engle* v. *Isaac*, 456 U.S. 107, 128-129 (1982). See also *Rizzo* v. *Goode*, 423 U.S. 362, 378-380 (1976).

3. The basic teaching of *National League of Cities* —that "under most circumstances federal power to regulate commerce [may] not be exercised in such a manner as to undermine the role of the states in our federal system" (*United Transportation Union* v. *Long Island R.R.*, 455 U.S. at 686)—is in harmony with the fundamental principle of federalism embodied in the Constitution and recognized in this Court's decisions in other contexts.[2] Although the Court described the Tenth Amendment as "an ex-

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[2] Indeed, in *National League of Cities* itself we stated our view that "Congress may not employ the commerce power to destroy the sovereignty of the States guaranteed by the Constitution," Gov't Br. 38, underscoring (*id.* at 41) the affirmation in *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968), that this "Court has ample power to prevent * * * 'the utter destruction of the State as a sovereign political entity.'" See also Gov't Br. on Reargument 6 n.1.

press declaration" of the federalism limitation it recognized (426 U.S. at 842), the decision in *National League of Cities* manifests the "essential role of the States in our federal system of government" (*id.* at 844). The Court's holding, in the end, rests upon the conclusion that in the enactment before it "Congress ha[d] sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system'" (426 U.S. at 852, quoting *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975)), and would "allow 'the National Government [to] devour the essentials of state sovereignty'" (426 U.S. at 855, quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

While it is fair to argue—as we do in this case—that particular federal enactments that directly affect state activities nonetheless lack the drastic impact on the continuing vitality of state government that was branded as impermissible in *National League of Cities*, we have no quarrel with the underlying core principle. Few principles are more pervasively reflected in the text and overall structure of our Constitution; few are more fundamental to the Framers' conception of our system of government. We accordingly turn our attention to the test that has been abstracted from *National League of Cities* to assess claims of state immunity from federal Commerce Clause legislation.

II

In *National League of Cities*, 426 U.S. at 852, the Court held that the 1974 amendments to the Fair Labor Standards Act that extended minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the State's freedom to struc-

ture integral operations in areas of traditional governmental functions." In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-288 (1981), the Court summarized the rule of *National League of Cities*, stating it in the form of a test:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

Even where these three requirements are met, a claim that commerce power legislation enacted by Congress impermissibly infringes state sovereignty may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29. Subsequent decisions of this Court have generally adhered to and applied this formulation of the test for intergovernmental immunity. See *Long Island R.R.*, 455 U.S. at 684 & n.9; *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 9-10.[3]

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[3] Unlike other "Tenth Amendment" cases that followed *National League of Cities*, *FERC* v. *Mississippi*, 456 U.S. 742 (1982), addressed the constitutionality of federal legislation designed to foster use of state regulatory processes to advance federal policy goals, rather than the immunity of state instrumentalities from non-discriminatory, generally applicable, federal regulation. *FERC* accordingly does not, for the most

We believe that some clarification of the *Virginia Surface Mining* test is appropriate and that clarification would reduce the volume of litigation in this area, which is attributable, at least in part, to uncertainty as to the contours of the doctrine involved. But we do not favor any substantial alteration of the test, which, as we understand it, appears faithful to the fundamental constitutional insight that links *National League of Cities* to the broad mainstream of this Court's federalism jurisprudence.

1. Representatives of the States have periodically sought to dispense with the first requirement of the prevailing test for intergovernmental immunity—*i.e.*, the requirement that challenged federal commerce power legislation be shown directly to regulate the "States as States." See, *e.g.*, Brief of Council of State Governments, *Connecticut* v. *United States*, No. 83-870 (October Term 1983). But this requirement, which sharply distinguishes federal commerce power legislation directly regulating private commerce from federal legislation that regulates state government itself, is firmly rooted in the "dual sovereignty of the government of the Nation and of the State[s]" (*National League of Cities* v. *Usery*, 426 U.S. at 845) and is required by this Court's countless decisions "attest[ing] to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with Federal law." *Virginia Surface Mining*, 452 U.S. at 290. See also *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534-535 (1941).

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part, rest upon application of the *Virginia Surface Mining* formulation. See 456 U.S. at 759. The Court recognized the validity of that test, however. *Id.* at 764 n.28.

"It is elementary and well-settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." *Missouri P. Ry.* v. *Stroud*, 267 U.S. 404, 408 (1925). This rule of undivided authority is unequivocally stated in the Supremacy Clause (Art. VI, Cl. 2). Any other rule would impermissibly "impair a prime purpose of the Federal Government's establishment" (*Case* v. *Bowles*, 327 U.S. 92, 102 (1946)). Thus, stare decisis, fidelity to the unambiguous command of the Supremacy Clause, and sensitivity to the very demands of constitutional structure that induced the Court in *National League of Cities* to recognize a protected realm of state sovereignty in the face of Congress's plenary Commerce Clause authority, combine to compel the conclusion that the doctrine of intergovernmental immunity can apply only when Congress legislates directly to regulate state government activity. See *EEOC* v. *Wyoming*, slip op. 10 n.10; *Virginia Surface Mining*, 452 U.S. at 286-290. See also *Duke Power Co.* v. *Carolina Envtl. Study Group*, 438 U.S. 59, 84 n.27 (1978).

2. The second prong of the *Virginia Surface Mining* formulation of the test for *National League of Cities* immunity—that the federal statute address matters that indisputably are attributes of state sovereignty—"poses significantly more difficulties," as the Court has remarked (*EEOC* v. *Wyoming*, slip op. 10). Cases subsequent to *National League of Cities* have not turned on this element of the test, and the Court has had "little occasion to amplify on * * * the concept" (*EEOC* v. *Wyoming*, slip op. 10 n.11). It appears to us that this requirement generally overlaps with the third prong of the test, which requires a showing of substantial impairment of state prerogatives regarding the organization of its instru-

mentalities (in traditional service areas). The second prong may accordingly safely be subsumed under the third, except perhaps, in one respect. By emphasizing that federal regulation may be held impermissible only if its disruptive impact on state sovereignty is indisputable, the second prong of the *Virginia Surface Mining* test highlights the limited scope of that doctrine and the limited role of the courts in enforcing it.

Because the doctrine of intergovernmental immunity is derived primarily from the structure of our constitutional system of dual sovereignties, it does not readily yield up clear rules for judicial application. Indeed, the Court has frankly acknowledged that the "determination of whether a federal law [impermissibly] impairs a state's authority * * * may at times be a difficult one" (*United Transportation Union* v. *Long Island R.R.*, 455 U.S. at 684). This problem has attracted considerable attention from the commentators. It has been argued that, because of its source in the structure of the federal constitutional system, the doctrine of intergovernmental immunity is one that, by its nature, should be enforced *exclusively* by the national political process. See Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552 (1977). Professor Wechsler has also emphasized the role of the political process (albeit without excluding entirely a role for the courts in enforcing federalism limitations upon Congress). See *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). On the other hand, it has been forcefully argued that protection of the structure of federalism is a task of surpassing importance for the courts. Nagel, *Fed-*

eralism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81. And Professor Tribe has observed that the mode of "structural inference" underlying *National League of Cities* is not, in principle at least, distinguishable from that employed by the Court in defense of federal authority in *McCulloch* v. *Maryland*, and that, "[i]f states are to have any real meaning, Congress must * * * be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell." *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065, 1068 n.17, 1071 (1977).

Of course, *National League of Cities* itself rejects the notion that enforcement of federalism restraints upon Congress's Commerce Clause authority is extrajudicial in nature. 426 U.S. at 841-842 n.12. We do not propose that that conclusion be reconsidered. At the same time, we think it correct to acknowledge that the States play an influential part in the national political process (see pages 3-7, *supra*) and therefore can check the exercise of the federal commerce power if that power is employed in a manner that eviscerates state sovereignty. These political "checks" should be kept in mind in assessing the scope of state immunity from federal regulation. See *Massachusetts* v. *United States*, 435 U.S. at 456-457 n.13 (opinion of Brennan, J.).[4]

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[4] The Court's rejection of the nonjusticiability argument in *National League of Cities* turned largely upon the idea that the structural guarantees of the Constitution ought not be waivable, and employed as example cases in which an Act of Congress had been held to infringe the prerogatives of the Executive Branch notwithstanding the fact that it had been signed by the President. While we agree that such separation of powers disputes do not present a political question, see

Thus, even in this context, as in ones more frequently confronted by the courts, Acts of Congress come before the Court cloaked with a strong presumption of constitutionality. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The standard by which claims of intergovernmental immunity are measured should accordingly make clear that judi-

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INS v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 21 & n.13, we do not think the analogy to the present situation wholly apt. Nor do we believe that recognition of the role played by the political branches in protecting federalism values depends upon embracing a doctrine of "waiver."

In a separation of powers dispute, Congress and the Executive come into direct conflict; if the rule of law is to prevail, the Court is required to interpret the Constitution and resolve their dispute. Cf. *Chadha*, slip op. 21. A "Tenth Amendment" claim has a different dynamic. Although there is necessarily a direct conflict between the ideal of federal authority and that of state sovereignty in such a case, the issue is not presented to the political branches in those terms, but is instead treated as a question of substantive policy, to be decided, of course, against a background of constitutional limits. To resolve such a matter in accordance with the position advocated by the states simply does not require any negation of federal authority. Nor does Congress or the President have any institutional commitment to favor federal authority over state interests in every situation or at all costs. Indeed, there is every reason to believe that the Congress and the President will both take seriously the prerogatives of the states and are fully prepared to hear and attempt to address their concerns. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). Congress's failure to accede to the states' point of view with respect to a particular item of legislation cannot be taken as a rejection of this trust. The case for deference to Congress is especially strong when Congress has carefully examined the very claims of disruption and hardship put forward in litigation and has found them to be factually unfounded. Of course, that is precisely what happened when Congress applied the FLSA to publicly owned transit operations. See pages 28-29, *infra*.

cial intervention is the exception rather than the rule. It is only when Congress appears plainly to have forgotten or forsaken the "unique benefits of a federal system in which the States enjoy a 'separate and independent existence'" (*EEOC* v. *Wyoming*, slip op. 9 (quoting *National League of Cities*, 426 U.S. at 845)) that the judicial power should be exercised to override a congressional enactment. By requiring states that claim immunity from federal commerce power legislation to show that the challenged statute "indisputably" undercuts their sovereignty, the *Virginia Surface Mining* formulation properly emphasizes that neither marginal nor merely arguable impacts are judicially cognizable.

A second, related, reason for adopting this posture of judicial restraint is the "institutional limitations" that restrict courts' "ability to gather information about 'legislative facts'" (*United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 2 (Blackmun, J., concurring); see also *Akron* v. *Akron Center for Reproductive Health, Inc.*, No. 81-746 (June 15, 1983), slip op. 5 n.4 (O'Connor, J., dissenting)). Yet as *National League of Cities* itself makes clear, intergovernmental immunity claims frequently present complex factual questions of impact. Compare 426 U.S. at 846-851, with *id.* at 873-874 & n.12, 878 (Brennan, J., dissenting). When a claim of intergovernmental immunity cannot be established by reference to the "direct and obvious" effect of the challenged federal legislation upon the viability of the federal system, judicial intervention is inappropriate. See *EEOC* v. *Wyoming*, slip op. 13. In such cases, the courts should defer to the political process as the arbiter of the competing claims of the states' and the nation. See Cox, *The Role of Congress in*

Constitutional Determinations, 40 U. Cinn. L. Rev. 199, 229-230 (1971).[5]

3. The third prong of the prevailing test for state immunity from federal commerce power regulation requires that a complaining state demonstrate that the challenged federal statute "directly impair[s] [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 288 (quoting *National League of Cities*, 426 U.S. at 852). A recurring problem in the application of this standard is to define "traditional governmental functions." It is our view that this standard for assessing immunity of state and local government functions should be essentially, if not exclusively, an historical one. This approach is most faithful to the clear intent of *National League of Cities*, most consistent with the analogous intergovernmental tax immunity doctrine, and truest to the federalism principle that underlies both doctrines.

In its opinion in *National League of Cities*, the Court pointedly characterized as "traditional" the governmental services that were held to be exempt

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[5] We do not agree that this consideration can be dismissed simply because an adjudication involves a clash between federal authority and state or local prerogatives. Cf. *EEOC* v. *Wyoming*, slip op. 13 n.8 (Burger, C.J., dissenting). We note, for instance, that in determining whether a state statute denies due process of law—a federal standard imposed upon the states by the Fourteenth Amendment—the Court has looked to the political judgments of the states generally that are embodied in their laws. Statutes that follow an approach adopted by many states are more readily held to meet the federal standard of due process than idiosyncratic ones. Compare *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 13 n.16, with *Addington* v. *Texas*, 441 U.S. 418 (1979); see also *Jones* v. *United States*, No. 81-5195 (June 29, 1983), slip. op. 15-16 & n.20.

from enforcement of the Fair Labor Standards Act. The Court stated that the impact of the challenged Fair Labor Standards Act amendments upon states' control of employment relations affecting "fire prevention, police protection, sanitation, public health, and parks and recreation" services was impermissible because "it is functions such as these which governments are created to provide, services such as these which the States have *traditionally* afforded their citizens (426 U.S. at 851; emphasis added). The Court added that its listing of exempt services was not "exhaustive," intimating that other services "well within the area of *traditional* operations of state and local governments" might qualify for similar treatment. 426 U.S. at 851 n.16 (emphasis added). And in overruling *Maryland* v. *Wirtz*, *supra*, the Court emphasized that the public schools and hospitals that were covered by the 1966 Fair Labor Standards Act amendments that had been upheld in that case represent "an integral portion of those governmental services which the States and their political subdivisions have *traditionally* afforded their citizens" (426 U.S. at 855; emphasis added).

"Traditionally" simply is not synonymous with "generally" or "typically." If the repeated use of the qualifiers "traditional" and "traditionally" does not import an historical standard, it is difficult to assign any meaning at all to these key terms. Our reading of *National League of Cities* is corroborated, moreover, by the Court's explanation that the holding of *United States* v. *California*, *supra*, remained good law because states historically have not regarded operation of a railroad as a governmental activity. 426 U.S. at 854 n.18.

Tracing *National League of Cities* to its doctrinal and precedential roots makes clear both that the

Court intended to establish an essentially historical test and that such a test is a sound and workable one. The analysis employed in *National League of Cities* is largely derived from Justice Rehnquist's dissent in *Fry* v. *United States*, *supra*. Justice Rehnquist's opinion employs an essentially historical standard in delineating exempt state functions, distinguishing *United States* v. *California*, *supra*, from *Maryland* v. *Wirtz* (421 U.S. at 557-558; emphasis added):

> I would hold the activity of the State of California in operating a railroad was so unlike the *traditional* governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act. But the operation of schools, hospitals, and like facilities involved in *Maryland* v. *Wirtz* is an activity sufficiently closely allied with *traditional* state functions that the wages paid by the state to employees of such facilities should be beyond Congress' commerce authority.

Justice Rehnquist acknowledged that "[s]uch a distinction would undoubtedly present gray areas to be marked out on a case-by-case basis," and remarked that "[t]he distinction suggested in *New York* v. *United States*, 326 U.S. 572 (1946), between activities traditionally undertaken by the State and other activities" would be useful in resolving such cases (421 U.S. at 558 & n.2).

Both *National League of Cities* and Justice Rehnquist's dissent in *Fry* rely heavily upon the doctrine of partial state immunity from federal taxation. See 426 U.S. at 842-843, 854; 421 U.S. at 552-556. As noted above (page 6, *supra*), that doctrine, like the *National League of Cities* doctrine, rests ultimately upon the federal structure of our constitutional system. But the tax immunity of the states has not been extended to "revenue-generating activities of the States that are of the same nature as those tradi-

tionally engaged in by private persons." *Massachusetts* v. *United States*, 435 U.S. at 457 (opinion of Brennan, J.). See, *e.g.*, *New York* v. *United States*, *supra*; *Allen* v. *Regents*, 304 U.S. 439 (1938); *Helvering* v. *Powers*, 293 U.S. 214 (1934); *Ohio* v. *Helvering*, 292 U.S. 360 (1934); *South Carolina* v. *United States*, 199 U.S. 437 (1905).[6] In *New York* v. *United States*, Chief Justice Stone espoused an historical standard that would prevent the states from acquiring expanded tax immunity, and thus eroding the federal taxing power and tax base, by taking over activities formerly performed by the private sector (326 U.S. at 588-589; citations omitted):

> [I]mmunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax * * * gives merely an accustomed and reasonable scope to the federal taxing power. * * * The nature of the tax immunity requires that it be so construed so as to allow to each government reasonable scope for its taxing power[.] The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from its subjects of taxation traditionally within it.[7]

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[6] As Justice Brennan observed in *Massachusetts* v. *United States*, 435 U.S. at 457 & nn.14-15, cases prior to *New York* v. *United States* relied, at least in part, upon a distinction between governmental and proprietary functions, but that distinction was rejected by all Members of the Court in *New York* v. *United States*, whereas the historical standard appeared to represent the consensus of the Court.

[7] Although Chief Justice Stone wrote for only four Members of the Court, the separate opinion of Justice Frank-

Accordingly, an interpretation of the states' partial immunity from federal commerce power regulation that precludes the states from expanding that immunity and curtailing the effective reach of federal authority by assuming functions previously performed by the private sector, is consistent with both the tax immunity doctrine and the principle of balanced federalism that links it to the *National League of Cities* doctrine. This Court's opinion in *Long Island R.R.* makes our point (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

As explained in our opening brief (at 41-42), because the Constitution does not treat the states and the nation as co-equal sovereigns as to matters within federal authority, see *FERC* v. *Mississippi*, 456 U.S. at 761; *Sanitary District* v. *United States*, 266 U.S. 405, 425 (1925), this principle properly extends to all cases where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area. Where state activities and patterns of operation are not entrenched prior to the enactment of federal legislation, federal requirements cannot be said to displace state decisions or disrupt settled patterns of organization, and do not imperil the vitality of the states.[8]

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furter, joined by Justice Rutledge, took a more restrictive view of state tax immunity. Only Justices Douglas and Black, in dissent, espoused a more expansive view of that immunity. See *Massachusetts* v. *United States*, 435 U.S. at 457-458 n.15.

[8] Of course, even when state activities are expanded prior to the onset of federal regulation, other factors—such as

We recognize that, in *Long Island R.R.*, 455 U.S. at 686, the Court stated that its emphasis on "traditional governmental functions and traditional aspects of state sovereignty" was not intended to "impose a static historical view of state functions generally immune from federal regulation." At the same time, the Court's holding that "federal regulation of a state-owned railroad simply does not impair a state's ability to function as a state" was predicated directly upon "the *historical* reality that the operation of railroads is not among the functions traditionally performed by state and local governments" (455 U.S. at 686; emphasis added). Thus, we take the message of *Long Island R.R.* to be that a focus on the historic scope of state activity is ordinarily proper, not because of a mechanical preoccupation with the past, but because such an inquiry is best calculated to discover "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence' " (455 U.S. at 686-687; citation omitted).

The standard we have proposed does not, in fact, adopt a "static historical view of state functions" or freeze the states in time so that only those activities performed when the Nation was founded qualify for protection under the intergovernmental immunity doctrine. Nor does it adopt any rigid across-the-board cutoff date for activities that are to be considered "traditional." Rather, the standard we espouse entails a more sensitive inquiry, one that turns upon whether the states had, prior to the ini-

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substantial federal financial or planning assistance in the enlargement of the states' roles—may demonstrate that state sovereignty is not threatened by federal regulatory legislation.

tial enactment of federal regulatory legislation applicable to a particular field of service or activity, generally established themselves, with settled patterns of organization, as providers of the service. This standard allows the states ample latitude for experimentation with, and expansion of, their services, while it precludes erosion of federal authority and provides a workable and objective standard capable of ready application by the courts. It thus strikes a balance essential for the preservation of our system of constitutional federalism.

This standard also accords proper deference to Congress which, in enacting legislation, must be presumed to be sensitive to the prerogatives of state and local government and to the federal structure of our constitutional system. As explained above (pages 12-16, *supra*), although we do not suggest that "Tenth Amendment" claims are nonjusticiable, we believe that the operation of the national political process affords substantial protection for state interests, and that as a result judicial restraint is appropriate in this area. As indicated in our initial brief (at 49-51), respect for Congress militates especially strongly against adoption of a rule that would permit shifting patterns of state activity to undermine the constitutionality of federal statutes that were valid when enacted. In other words, the constitutionality of federal Commerce Clause legislation must be adjudged in terms of the state activities that were traditional at the time when the legislation was enacted.

Congress is the best equipped of the three branches of government to engage in the necessary kind of factfinding concerning patterns of political, social and economic organization, and the bearing that these have upon the provision of governmental services. The rule we suggest enables Congress to discharge

its constitutional responsibility at the time it enacts legislation, free of the threat that its legislative product will, for reasons beyond its control, drift into a status of unconstitutionality at some unascertainable future time. Moreover, such a rule would entrust to Congress the task of periodically reviewing the corpus of enacted law to ascertain whether shifting patterns of state activity warrant any statutory change. Congress, unlike the courts, possesses not only the requisite capabilities for the task, but also, by its nature, the political sensitivity to " 'accommodat[e] the competing demands' in this area" (*United States* v. *New Mexico*, 455 U.S. 720, 737-738 (1982), quoting *Massachusetts* v. *United States*, 435 U.S. at 456 (opinion of Brennan, J.)).

Judicial deference to Congress in this setting is not inconsistent with fundamental federalism principles. *National League of Cities* has two salient features. First, building upon earlier precedent, the Court announced the general principle that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary power to tax or to regulate commerce" (426 U.S. at 842). Second, the Court identified certain core functions that the federal government may not disrupt in the exercise of its Commerce Clause authority. Neither of the Court's holdings need be or should be disturbed. Within the constitutional framework established, however, the application of these principles to state government activities not explicitly addressed in *National League of Cities* will turn largely upon historical considerations, factual assessments and a careful weighing of competing state and federal objectives. See pages 25-26, *infra*. These determinations will likely involve the kinds of fine-tuning and interest balancing that Congress—composed of rep-

resentatives of the states—is particularly well-equipped to undertake. Cf. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, No. 82-1005 (June 25, 1984), slip op. 27.[9]

4. The final element of the *Virginia Surface Mining* formulation for assessing claims of Tenth Amendment immunity is the "balancing test," which recognizes that, notwithstanding any intrusion upon state prerogatives, the nature of the federal interest underlying an Act of Congress that applies to state activities may override the states' sovereignty claim. We believe that the "safety valve" built into the intergovernmental immunity doctrine by the "balancing test" is essential to its validity. As Justice Blackmun observed in his concurring opinion in *National League of Cities*, 426 U.S. at 856, a balancing approach preserves paramount federal authority vis-a-vis the states "in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." In other words, where attainment of a statutory goal within the reach of Congress's commerce power requires a uniform legislative scheme, applicable to all who enter the regulated field of activity, vindication of Congress's plenary power to regulate commerce dictates that states, like others who enter the field, be bound by the federal enactment. The balancing test thus ensures that the intergovernmental immunity doctrine

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[9] Particularly when a fundamental constitutional principle has been elucidated by this Court, and Congress thereafter enacts legislation reflecting its assessment of the competing interests and pertinent legislative facts, special deference is due to these congressional judgments from courts that are called upon to apply the constitutional standard to the specific situation or circumstances addressed by Congress. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).

does not serve to "impair a prime purpose of the Federal Government's establishment" (*Case* v. *Bowles*, 327 U.S. at 102).

Moreover, in assessing the nature of the federal interest, substantial deference is due to Congress's judgment that a uniform legislative scheme is necessary to secure the statutory objective. The railroad case illustrates the principle. In *Long Island R.R.*, the Court observed that "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system" (455 U.S. at 688). The Court concluded that, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the *uniformity thought essential by Congress* and would endanger the efficient operation of the interstate rail system" (*id.* at 689; emphasis added). See also *California* v. *Taylor*, 353 U.S. 553, 567 & n.15 (1957). The Court has properly declined to second-guess these congressional determinations.

III

In our opening and reply briefs filed last Term we have explained why neither the doctrine nor the holding of *National League of Cities* controls this case; we do not undertake to repeat that discussion here. We think it useful, however, to highlight briefly the relevance of the foregoing general discussion to the relatively narrow question that must be decided in this case.

As we have previously detailed (Gov't Opening Br. 16-18), operation of transit services is not, by any measure, an established municipal service of long standing. Rather, it is the product of a dramatic shift within the last 20 years from provision of tran-

sit services almost exclusively by private enterprise to a mixed industry. That shift occurred only in the wake of establishment of a federal program providing massive financial assistance to localities that took over private transit operations. That program was established by Congress in response to the urgent appeals of state and local officials who claimed that, without substantial federal aid, they would simply be unable to operate transit services. Congress agreed, finding that "[m]ass transportation needs have outstripped the present resources of the cities and the States; * * * that a nationwide program can substantially assist in solving transportation problems" (H.R. Rep. 204, 88th Cong., 1st Sess. 4 (1963)), and that without significant federal aid adequate mass transportation could not or would not be provided by the states and municipalities on their own (S. Rep. 82, 88th Cong., 1st Sess. 4-5 (1963)). See Gov't Opening Br. 26-32. In light of the traditional dominance of the local transit industry by the private sector, the recent entry of local government into the industry, and the critical role played by federal aid in establishing and maintaining the public sector, it seems beyond question that mass transit is not a traditional governmental function that must be exempted from non-discriminatory federal Commerce Clause legislation lest we jeopardize the vitality of the states.

It can scarcely be claimed, moreover, that the states generally had undertaken to provide mass transit services and had established settled patterns of organization in the field even by 1961, when the Fair Labor Standards Act was applied to the local transit industry, much less at an earlier time when the federal government began its regulation of employment in this area. Appellees have—understandably—never even suggested that the Fair Labor Standards Act

amendments that extended coverage to public transit employees were unconstitutional under the standards applied in *National League of Cities* when they were enacted in 1966. Thus, their argument depends entirely upon recognition of a rule of creeping unconstitutionality—*i.e.*, that political and economic developments subsequent to enactment of the challenged provisions rendered them no longer constitutional as of some unspecified date.

Appellees' argument highlights the unworkability of an ahistorical approach to claims of intergovernmental immunity. The rule proposed allows for no settled determinations by the courts, and permits no confidence on Congress's part that action within the "accustomed and reasonable scope [of] federal * * * power" (*New York* v. *United States*, 326 U.S. at 589 (Stone, C.J., concurring)) will be upheld as proper. Rather, questions of constitutionality of federal legislation affecting the states would be open to continual judicial reexamination, and the doctrine of intergovernmental immunity would function as a crude form of constitutional "sunset" legislation. We urge rejection of a constitutional rule founded on such shifting sands, with its attendant burdens upon the legislative and judicial branches.

For reasons discussed above, this is precisely the kind of case where deference to Congress's judgment is appropriate. Congress determined that the minimum wage and overtime provisions of the Fair Labor Standards Act should be extended to public transit systems to prevent unfair competition. H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. 1487, 89th Cong., 2d Sess. 8 (1966). Appellees now claim that that determination is outmoded because of changed conditions in the transit industry.[10] Absent

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[10] We note with interest the plans of the British government to reestablish local bus service as a private sector func-

the most unusual circumstances, such arguments should be addressed to Congress. And deference to Congress's judgment is particularly appropriate here, because, by all accounts, programs established by Congress played a vital role in making feasible widespread public sector participation in the local transit industry. Congress also carefully assessed the claims —advanced here by appellees—that the overtime requirements of the Fair Labor Standards Act create special hardships for transit operators. Congress concluded, based upon review of collective bargaining agreements in the transit industry, which almost uniformly required payment of overtime after 40 hours in a work week, that "the 'problems' of the 40-hour workweek pointed to by some segments of the industry have and are already being met and resolved by a substantial majority of the industry" (H.R. Rep. 93-913, 93d Cong., 2d Sess. 31 (1974)).[11] Appellees

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tion. *The Freedom Road*, The Economist, July 14, 1984, at 58.

[11] Appellees note that premium rates are frequently paid in the transit industry because of its scheduling practices (APTA Br. 21; NLC Br. 9-10). But contrary to the perhaps deliberately vague predictions of appellees (APTA Br. 21, NLC Br. 10), the requirements of the FLSA would not simply be superimposed upon any existing premium pay arrangements. The FLSA generally requires that an employee be paid 1½ times his "regular rate" of pay for all hours worked in excess of 40 in a week. See 29 U.S.C. 207(a)(1). However, the FLSA expressly provides for exclusion of various forms of "extra compensation" in establishing an employee's regular rate of pay. See, *e.g.*, 29 U.S.C. 207(e)(5), (7), and such extra compensation is creditable towards the overtime pay required by the Act. 29 U.S.C. 207(h). Contrary to appellees' implication, it has never been determined in this case, or in any other forum, that existing premium pay arrangements must be treated as part of the "regular rate" to which overtime is applied. See Colella, *Mass Transit and the Tenth*

have offered no reason for overriding Congress's considered determination on this matter. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973).

For the foregoing reasons, and the reasons set forth in our opening and reply briefs, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1984

Amendment, 9 Intergovernmental Perspective, Fall 1983, at 17, 23. Indeed, it is safe to assume that appellees would resist any such ruling.

In any event, even if it were determined that existing premium pay arrangements in some cities are structured so as to be considered part of the "regular rate," the FLSA would not, as a practical matter, require that overtime be paid on the basis of such premium rates in the future. Because of the relatively high wage standards that are said to prevail in the transit industry generally (see NLC Br. 8)—well in excess of the statutory minimum wage (see Gov't Opening Br. 8 n.12)—it remains open to management and labor to renegotiate existing premium pay arrangements in light of the requirements of the FLSA to assure that aggregate compensation is not increased. Thus, the FLSA does not require transit operators to pay overtime in any different manner or amount than other employers are required to pay.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10023

No. 82-1951-ADX
Status: GRANTED

Title: Raymond J. Donovan, Secretary of Labor, Appellant
v.
San Antonio Metropolitan Transit Authority, et al.

Docketed:
June 1, 1983

Court: United States District Court for the
Western District of Texas

Vide:
82-1913

See also:

Counsel for appellant: Solicitor General, Gold, Laurence

Counsel for appellee: Parker Jr., George C., Coleman
Jr., William T.

Entry	Date	Note	Proceedings and Orders
1	Apr 23 1983		Application for extension of time to docket appeal and order granting same until June 1, 1983 (White, April 25, 1983).
2	Jun 1 1983	G	Statement as to jurisdiction filed.
4	Jun 13 1983		Order extending time to file response to jurisdictional statement until August 19, 1983.
5	Jul 8 1983		Brief amicus curiae of Natl. League of Cities, et al. filed. VIDED.
6	Aug 19 1983		Motion of appellee San Antonio MTA to affirm filed. VIDED.
7	Aug 19 1983		Motion of appellee Am. Public Transit Assn. to affirm filed. VIDED.
8	Aug 24 1983		DISTRIBUTED. September 26, 1983
10	Sep 21 1983	X	Reply brief of appellant Raymond J. Donovan, etc. filed.
11	Oct 3 1983		PROBABLE JURISDICTION NOTED. The case is consolicated with 82-1913 and a total of one hour is allotted for oral argument.
			**********
13	Nov 15 1983		Order extending time to file brief of appellant on the merits until November 28, 1983.
14	Nov 15 1983	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
15	Nov 28 1983		Motion of the Solicitor General to disperse with printing the joint appendix GRANTED.
16	Nov 28 1983		Brief of appellant Joe G. Garcia in 82-1913 filed. VIDED.
17	Nov 29 1983		Application to exceed page limits on appellant's brief on the merits filed with BRW (A-411).
18	Nov 29 1983		Order granting same not to exceed 52 pages by White, J.
19	Dec 5 1983		Brief of appellant Donovan, Sec. of Labor filed. VIDED.
21	Dec 13 1983	D	Motion of appellees for divided argument filed.
23	Dec 19 1983		Order extending time to file brief of appellee on the merits until February 3, 1984.
24	Dec 28 1983	N	Motion of National Institute of Municipal Law Officers for leave to file a brief as amicus curiae filed.
25	Jan 3 1984		Record filed.
26	Jan 3 1984		Certified original record, 2 boxes, received.
27	Jan 9 1984		Motion of appellees for divided argument DENIED.
28	Dec 28 1983		Brief amicus curiae of National Institute of Municipal Law Officers filed. VIDED.
29	Feb 3 1984		Brief of appellee Am. Public Transit Assn. filed. VIDED.

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No. 82-1951-ADX

Entry	Date	Note	Proceedings and Orders
30	Feb 3 1984		Brief of appellee San Antonic MTA filed. VIDED.
31	Feb 3 1984		brief amicus curiae of Legal Fourication of America filed. VIDED.
32	Feb 3 1984		Brief amicus curiae of Natl. League of Cities, et al. filed. VIDED.
33	Feb 1 1984		Leave to exceed pages on amicus brief of Nat'l. League of Cities, et al. filed with ERW (A-616).
34	Feb 3 1984		Order granting leave to file amici curiae brief in excess of page limitations, not to exceec 33 pages.
35	Feb 14 1984		SET FOR ARGUMENT. Monday, March 19, 1984. (1st case) This case is consolidated with Nc. 82-1913. (1 hour)
36	Feb 15 1984		CIRCULATED.
37	Mar 12 1984	X	Reply brief of appellant Joe G. Garcia filed. VIDED.
38	Mar 12 1984	X	Reply brief of appellant Donovan, Sec. of Labor filec. VIDED.
39	Mar 19 1984		ARGUED.
40	Jul 5 1984		The case is retored to the calencar for reargument. In addition to the questions presentec in the juris-
41	Jul 5 1984		dictional statement and previously briefed and argued, the parties are requestec to brief arc argue the
42	Jul 5 1984		following question: Whether or nct the principles of the Tenth Amendment as set forth in Naticral League of
43	Jul 5 1984		Cities v. Usery, 426 U.S. 833 (1976), shculd be recorsidered?
45	Jul 5 1984		For briefing schedule on reargument see 82-1913.
46	Jul 26 1984	G	Motion of the Solicitor General for civiced argument filed.
47	Jul 30 1984		Supplemertal brief of appellant Donovan, Sec. of Labcr on rearcument filed. VIDED.
48	Jul 30 1984		Supplemertal brief of appellant Jce G. Garcia on reargument filec. VIDED.
49	Aug 6 1984		Order extending time to file appellees' supplemertal briefs on reargument to and including September 5, 1984
50	Aug 6 1984		for typewritten briefs, and to and incluciny September 10, 1984 for printed briefs.
51	Aug 9 1984	D	Motion of National League of Cities, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument filed.
52	Aug 10 1984		SET FOR REARGUMENT. Monday, October 1, 1984. (1st case) This case is consolidatec with Nc. 82-1913. (1 hr)
53	Aug 17 1984		Application of Nat'l. League of Cities, et al. for leave to file amici curiae brief in excess of the pages filed
54	Aug 22 1984		and order denying same by White, J. (A-107).
55	Aug 23 1984		Motion of the Solicitor General for divided argument GRANTED.
56	Aug 27 1984		CIRCULATED.
57	Aug 30 1984		Application for leave to exceed pages on amici curiae brief of Nat'l. League of Cities filed with ERW (A-142).
58	Aug 30 1984		Order granting same not to exceec 34 pages by White, J.
59	Aug 31 1984	X	Brief amicus curiae of Natl. League of Cities, et al. filed. VIDED.

No. 82-1951-ADX

Entry	Date	Note	Proceedings and Orders
60	Sep 5 1984	X	Brief amicus curiae of California, et al. filed. VIDED.
61	Sep 5 1984	X	Brief amicus curiae of Natl. Inst. of Municipal Law filed. VIDED.
62	Sep 5 1984	X	Brief amicus curiae of Colorado Public Employees Retirement Assn. filed. VIDED.
63	Sep 7 1984	X	Supplemental brief of appellee Am. Public Transit Assn. on rearqument filed. VIDED.
64	Sep 7 1984		Supplemental brief of appellee San Antonio MTA on rearqument filed. VIDED.
65	Sep 5 1984	X	Brief amicus curiae of Nat'l. Public Employer Labor Relations Assn., et al. filed. VIDED.
66	Sep 18 1984		Motion of National League of Cities, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument DENIED.
67	Sep 24 1984	X	Reply brief of appellant Donovan, Sec. of Labor on rearqument filed. VIDED.
68	Sep 24 1984	X	Reply brief of appellant Joe G. Garcia filed. VIDED.
69	Oct 1 1984		REARGUED.

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Nos. 82-1913 and 82-1951

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR

REX E. LEE
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Department of Justice
Washington, D.C. 20530
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23 pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 82-1913

JOE G. GARCIA, APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

This supplemental brief is filed in response to the Court's request that the parties address the question "[w]hether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered." We believe that some clarification of the test for intergovernmental immunity established in National League of Cities and subsequent cases is desirable, so as to lay to rest prevalent misconceptions about the rule established. But the key principle articulated in National League of Cities is sound and

enduring constitutional doctrine. That is, we agree that the federal commerce power may not be exercised directly to regulate state activity in a manner that would "hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" United Transportation Union v. Long Island R.R., 455 U.S. 678, 687 (1982) (quoting National League of Cities, 426 U.S. at 851). This modest limitation upon the commerce power is the necessary consequence of the federal structure of our constitutional system and fits comfortably within the context of this Court's decisions on other aspects of federal-state relations.

The prevailing test for assessing claims of state immunity from federal Commerce Clause legislation is, in our view, generally satisfactory. Several points, however, may profitably be clarified. First, the role of the courts in this area is inherently a limited one. Only when Congress ignores the values behind federalism and nullifies state prerogatives in performing core functions may its Acts be set aside. Second, the standard by which it is determined whether particular state activities are protected must be essentially an historical one. In reaching this conclusion, we do not envision a frozen list of protected state activities. Rather, the test must be whether, at the time the federal government first entered the field with regulatory legislation, the states had generally established themselves with fixed patterns of organization as providers of the particular service. Absent such a long-standing tradition of state activity in a field, federal regulation simply cannot be said impermissibly to trench upon state prerogatives.

These principles require reversal of the judgment of the district court. There can be no serious claim that the states had generally undertaken to provide public transit service before the enactment of federal legislation governing employment relations in transit or wages and hours in the labor market

generally, or even by the time the Fair Labor Standards Act was applied to public transit employees. The major shift to the public sector occurred instead in the wake of a program of massive federal financial assistance for public transit undertakings. It would therefore be a one-sided federalism indeed that would place employees of publicly-owned transit systems beyond the reach of nondiscriminatory federal wage and hour legislation.

ARGUMENT

I

1. Ours is a federal constitution and a federal system. The federal principle of division of authority between the national government and the states is imbued in both the constitutional text, which recognizes the states as enduring units of government, and in the overall structure of the national charter. The Tenth Amendment, which declares that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," announces the principle directly. The national government, although supreme within its constitutional domain under the Supremacy Clause, is one of delegated (albeit broad and far-reaching) powers. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). The states, by contrast, are the presumptive holders of powers not otherwise allocated in the constitutional regime. The vitality of the states as functioning members of this partnership of governments is thus an essential feature of the scheme.

The Court said in Fry v. United States, 421 U.S. 542, 547 n.7 (1975), that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." The Tenth Amendment demonstrates that "our Federal Government is one of delegated

powers" (National League of Cities v. Usery, 426 U.S. at 861 n.4 (Brennan, J., dissenting)) and that the states must remain vital organs of general government. The principle of intergovernmental immunity, stripped to its essentials, is a means of preservation of that structure of federal-state coexistence. The Constitution, read as a whole, necessarily presupposes the existence of, and thus requires the protection of, some sphere of autonomy for the states in the conduct of their own core operations.

But the Tenth Amendment is only the most obvious textual manifestation of the federal principle and of the enduring role assigned to the states in our system of government. Others abound. As the Court said in Collector v. Day, 78 U.S. (11 Wall.) 113, 125 (1870), "in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized." The Eleventh Amendment, for instance, confirms a limitation upon the judicial power of the United States, exemplifying a broader principle of state sovereign immunity located in the Constitution. See Pennhurst State School & Hosp. v. Halderman, No. 81-2101 (Jan. 23, 1984), slip op. 7-8 & n.8. Article VII, prescribing the procedure for placing the new Constitution in operation, and Article V, governing ratification of subsequent amendments, reflect the states' role as delegator of authority under our constitutional system. Article IV, Section 3, establishes the territorial inviolability and indivisibility of the states, precluding their fragmentation or consolidation by Congress without the consent of the states concerned. Cf. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) (equal footing doctrine).

The intended role of the states as repositories of legitimate authority in the federal scheme is also demonstrated by the many responsibilities assigned to the states in the establishment of tne legislative and executive branches of the federal

government. See Collector v. Day, 78 U.S. (11 Wall.) at 125. Representatives to the House of Representatives are "apportioned among the several States which may be included within this Union" (Art. I, § 2, Cl. 3; see also Amend. XIV, § 2). Senators are apportioned, two to each state (Art. I, § 3, Cl. 1). Of course, the Seventeenth Amendment substituted direct election for selection of senators by state legislatures. But a more fundamental recognition of the political permanence of the states, the legacy of the "Great Compromise" that made possible the success of the Constitutional Convention, remains: "no State, without its Consent [may] be deprived of its equal Suffrage in the Senate" (Art. V).

States were also assigned a key role in the mechanism for selection of the President. Both the composition of the electoral college, in which electors are allocated to the states in proportion to their overall representation in the House and Senate, and the method of selection of electors, which is left to the discretion of the individual states (Art. II, § 1, Cl. 2), reaffirm that the national government was meant to draw its authority from the states. And this point is underscored by the constitutional provision for selection of a President when no candidate garners a majority of the electoral college: a poll of the House of Representatives, the delegation of each state collectively exercising one vote, with "a majority of all of the states * * * necessary to a choice" (Amend. XII).

2. The decisions of this Court in a number of contexts that may otherwise seem unrelated reflect the protection afforded by the Constitution to core aspects of state sovereignty. More than a century ago, in Collector v. Day, supra, the Court recognized "[t]hat the existence of the States implies some restriction on the national taxing power" as applied to state instrumentalities. Massachusetts v. United States, 435 U.S. 444, 454 (1978)

(opinion of Brennan, J.). 1/ The partial immunity of state instrumentalities from federal taxation is "implied from the nature of our federal system and the relationship within it of state and national governments." United States v. California, 297 U.S. 175, 184 (1936). And that immunity is not limited to federal taxation that discriminates against states, but extends generally to taxation that "unduly interferes with the State's function of government." New York v. United States, 326 U.S. 572, 588 (1946) (Stone, C.J., concurring). See also Massachusetts v. United States, 435 U.S. at 456-460 (opinion of Brennan, J.).

This Court has also employed the federalism principle as a pole star in defining the jurisdiction of the federal courts and delineating the proper exercise thereof. For example, the Court has discerned a sovereign immunity limitation upon the judicial power conferred on the United States by Article III, see Pennhurst State School & Hosp., slip op. 7-8, explaining that the Eleventh Amendment is "but an exemplification" of a more "fundamental rule." Ex parte New York, 256 U.S. 490, 497 (1921). Indeed, the Court has relied on notions on federalism to restrict the power of the federal courts even in cases properly within their jurisdiction. In Younger v. Harris, 401 U.S. 37 (1971), the Court held that, absent extraordinary circumstances, federal courts should not enjoin an ongoing state criminal proceeding, explaining that the ruling reflected (id. at 44)

> a proper respect of state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

1/ While the rule applied in Collector v. Day, -- i.e., that a state's intergovernmental immunity from federal taxation extends to its officers -- has since been overruled, see Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939), the doctrine of immunity survives as to state instrumentalities themselves.

The Court added (id. at 44-45) that the doctrine of "Our Federalism"

> does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Goverment and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

See also Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 431-432 (1982) (Younger applies to noncriminal state proceedings where "important state interests are involved"). Similar policies are reflected in the Burford abstention doctrine, which limits the role of federal courts where assumption of jurisdiction would disrupt establishment of coherent state policy in matters subject to state law (Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943); Colorado River Water Conservation District v. United States, 424 U.S. 800, 814-815 (1976)), and in the limitations upon the exercise of federal habeas corpus power to review state convictions, see Reed v. Ross, No. 83-218 (June 27, 1984), slip op. 8-9; Engle v. Isaac, 456 U.S. 107, 128-129 (1982). See also Rizzo v. Goode, 423 U.S. 362, 378-380 (1976).

3. The basic teaching of National League of Cities -- that "under most circumstances federal power to regulate commerce [may] not be exercised in such a manner as to undermine the role of the states in our federal system" (United Transportation Union v. Long Island R.R., 455 U.S. at 686) -- is in harmony with the fundamental principle of federalism embodied in the Constitution

and recognized in this Court's decisions in other contexts. 2/ Although the Court described the Tenth Amendment as "an express declaration" of the federalism limitation it recognized (426 U.S. at 842), the decision in National League of Cities manifests the "essential role of the States in our federal system of government" (id. at 844). The Court's holding, in the end, rests upon the conclusion that in the enactment before it "Congress ha[d] sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system'" (426 U.S. at 852, quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)), and would "allow 'the National Government [to] devour the essentials of state sovereignty'" (426 U.S. at 855, quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

While it is fair to argue -- as we do in this case -- that particular federal enactments that directly affect state activities nonetheless lack the drastic impact on the continuing vitality of state government that was branded as impermissible in National League of Cities, we have no quarrel with the underlying core principle. Few principles are more pervasively reflected in the text and overall structure of our Constitution; few are more fundamental to the Framers' conception of our system of government. We accordingly turn our attention to the test that has been abstracted from National League of Cities to assess claims of state immunity from federal Commerce Clause legislation.

II

In National League of Cities, 426 U.S. at 852, the Court held that 1974 amendments to the Fair Labor Standards Act that

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2/ Indeed, in National League of Cities itself we stated our view that "Congress may not employ the commerce power to destroy the sovereignty of the States guaranteed by the Constitution," Gov't Br. 38, underscoring (id. at 41) the affirmation in Maryland v. Wirtz, 392 U.S. at 196, that this "Court has ample power to prevent * * * 'the utter destruction of the State as a sovereign political entity.'" See also Gov't Br. on Reargument 6 n.1.

extended minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." In Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287-288 (1981), the Court summarized the rule of National League of Cities, stating it in the form of a test:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." Id. at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." Id. at 852.

Even where these three requirements are met, a claim that commerce power legislation enacted by Congress impermissibly infringes state sovereignty may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29. Subsequent decisions of this Court have generally adhered to and applied this formulation of the test for intergovernmental immunity. See Long Island R.R., 455 U.S. at 684 & n.9; EEOC v. Wyoming, No. 81-554 (Mar. 2, 1983), slip op. 9-10. 3/

We believe that some clarification of the Virginia Surface Mining test is appropriate and that clarification would reduce the volume of litigation in this area, which is attributable, at

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3/ Unlike other "Tenth Amendment" cases that followed National League of Cities, FERC v. Mississippi, 456 U.S. 742 (1982), addressed the constitutionality of federal legislation designed to foster use of state regulatory processes to advance federal policy goals, rather than the immunity of state instrumentalities from non-discriminatory, generally applicable, federal regulation. FERC accordingly does not, for the most part, rest upon application of the Virginia Surface Mining formulation. See 456 U.S. at 759. The Court recognized the validity of that test, however. Id. at 764 n.28.

least in part, to uncertainty as to the contours of the doctrine involved. But we do not favor any substantial alteration of the test, which, as we understand it, appears faithful to the fundamental constitutional insight that links National League of Cities to the broad mainstream of this Court's federalism jurisprudence.

1. Representatives of the States have periodically sought to dispense with the first requirement of the prevailing test for intergovernmental immunity -- i.e., the requirement that challenged federal commerce power legislation be shown directly to regulate the "States as States." See, e.g., Brief of Council of State Governments, Connecticut v. United States, No. 83-870 (October Term 1983). But this requirement, which sharply distinguishes federal commerce power legislation directly regulating private commerce from federal legislation that regulates state government itself, is firmly rooted in the "dual sovereignty of the government of the Nation and of the State[s]" (National League of Cities v. Usery, 426 U.S. at 845) and is required by this Court's countless decisions "attest[ing] to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with Federal law." Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 290. See also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534-535 (1941).

"It is elementary and well-settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." Missouri P. Ry. v. Stroud, 267 U.S. 404, 408 (1925). This rule of undivided authority is unequivocally stated in the Supremacy Clause (Art. VI, Cl. 2). Any other rule would impermissibly "impair a prime purpose of the Federal Government's establishment" (Case v. Bowles, 327 U.S. 92, 102 (1946)). Thus, stare decisis, fidelity to the unambiguous command of the Supremacy Clause, and

sensitivity to the very demands of constitutional structure that induced the Court in National League of Cities to recognize a protected realm of state sovereignty in the face of Congress's plenary Commerce Clause authority, combine to compel the conclusion that the doctrine of intergovernmental immunity can apply only when Congress legislates directly to regulate state government activity. See EEOC v. Wyoming, slip op. 10 n.10; Virginia Surface Mining, 452 U.S. at 286-290. See also Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 84 n.27 (1978).

2. The second prong of the Virginia Surface Mining formulation of the test for National League of Cities immunity -- that the federal statute address matters that indisputably are attributes of state sovereignty -- "poses significantly more difficulties," as the Court has remarked (EEOC v. Wyoming, slip op. 10). Cases subsequent to National League of Cities have not turned on this element of the test, and the Court has had "little occasion to amplify on * * * the concept" (EEOC v. Wyoming, slip op. 10 n.11). It appears to us that this requirement generally overlaps with the third prong of the test, which requires a showing of substantial impairment of state prerogatives regarding the organization of its instrumentalities (in traditional service areas). The second prong may accordingly safely be subsumed under the third, except perhaps, in one respect. By emphasizing that federal regulation may be held impermissible only if its disruptive impact on state sovereignty is indisputable, the second prong of the Virginia Surface Mining test highlights the limited scope of that doctrine and the limited role of the courts in enforcing it.

Because the doctrine of intergovernmental immunity is derived primarily from the structure of our constitutional system of dual sovereignties, it does not readily yield up clear rules for judicial application. Indeed, the Court has frankly

acknowledged that the "determination of whether a federal law [impermissibly] impairs a state's authority * * * may at times be a difficult one" (United Transportation Union v. Long Island R.R., 455 U.S. at 684). This problem has attracted considerable attention from the commentators. It has been argued that, because of its source in the structure of the federal constitutional system, the doctrine of intergovernmental immunity is one that, by its nature, should be enforced exclusively by the national political process. See Choper, The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review, 86 Yale L.J. 1552 (1977). Professor Wechsler has also emphasized the role of the political process (albeit without excluding entirely a role for the courts in enforcing federalism limitations upon Congress). See The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). On the other hand, it has been forcefully argued that protection of the structure of federalism is a task of surpassing importance for the courts. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81. And Professor Tribe has observed that the mode of "structural inference" underlying National League of Cities is not, in principle at least, distinguishable from that employed by the Court in defense of federal authority in McCulloch v. Maryland, and that, "[i]f states are to have any real meaning, Congress must * * * be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell." Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1068 n.17, 1071 (1977).

Of course, National League of Cities itself rejects the notion that enforcement of federalism restraints upon Congress's Commerce Clause authority is extra-judicial in nature. 426 U.S.

at 841-842 n.12. We do not propose that that conclusion be reconsidered. At the same time, we think it correct to acknowledge that the States play an influential part in the national political process (see pages 3 - 6, supra) and therefore can check the exercise of the federal commerce power if that power is employed in a manner that eviscerates state sovereignty. These political "checks" should be kept in mind in assessing the scope of state immunity from federal regulation. See Massachusetts v. United States, 435 U.S. at 456-457 n.13 (opinion of Brennan, J.). 4/

4/ The Court's rejection of the nonjusticiability argument in National League of Cities turned largely upon the idea that the structural guarantees of the Constitution ought not be waivable, and employed as an example cases in which an Act of Congress had been held to infringe the prerogatives of the Executive Branch notwithstanding the fact that it had been signed by the President. While we agree that such separation of powers disputes do not present a political question, see INS v. Chadha, No. 80-1832 (June 23, 1983), slip op. 21 & n.13, we do not think the analogy to the present situation wholly apt. Nor do we believe that recognition of the role played by the political branches in protecting federalism values depends upon embracing a doctrine of "waiver."

In a separation of powers dispute, Congress and the Executive come into direct conflict; if the rule of law is to prevail the Court is required to interpret the Constitution and resolve their dispute. Cf. Chadha, slip op. 21. A "Tenth Amendment" claim has a different dynamic. Although there is necessarily a direct conflict between the ideal of federal authority and that of state sovereignty in such a case, the issue is not presented to the political branches in those terms, but is instead treated as a question of substantive policy, to be decided, of course, against a background of constitutional limits. To resolve such a matter in accordance with the position advocated by the states simply does not require any negation of federal authority. Nor does Congress or the President have any institutional commitment to favor federal authority over state interests in every situation or at all costs. Indeed, there is every reason to believe that the Congress and the President will both take seriously the prerogatives of the states and are fully prepared to hear and attempt to address their concerns. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). Congress's failure to accede to the states' point of view with respect to a particular item of legislation cannot be taken as a rejection of this trust. The case for deference to Congress is especially strong when Congress has carefully examined the very claims of disruption and hardship put forward in litigation and has found them to be factually unfounded. Of course, that is precisely what happened when Congress applied the FLSA to publicly owned transit operations. See page 26, infra.

Thus, even in this context, as in ones more frequently confronted by the courts, Acts of Congress come before the Court cloaked with a strong presumption of constitutionality. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). The standard by which claims of intergovernmental immunity are measured should accordingly make clear that judicial intervention is the exception rather than the rule. It is only when Congress appears plainly to have forgotten or forsaken the "unique benefits of a federal system in which the States enjoy a 'separate and independent existence'" (EEOC v. Wyoming, slip op. 9 (quoting National League of Cities, 426 U.S. at 845)) that the judicial power should be exercised to override a congressional enactment. By requiring states that claim immunity from federal commerce power legislation to show that the challenged statute "indisputably" undercuts their sovereignty, the Virginia Surface Mining formulation properly emphasizes that neither marginal nor merely arguable impacts are judicially cognizable.

A second, related, reason for adopting this posture of judicial restraint is the "institutional limitations" that restrict courts' "ability to gather information about 'legislative facts'" (United States v. Leon, No. 82-1771 (July 5, 1984), slip op. 2 (Blackmun, J., concurring); see also Akron v. Akron Center for Reproductive Health, Inc., No. 81-746 (June 15, 1983), slip op. 5 n.4 (O'Connor, J., dissenting)). Yet as National League of Cities itself makes clear, intergovernmental immunity claims frequently present complex factual questions of impact. Compare 426 U.S. at 846-851 with id. at 873-874 & n.12, 878 (Brennan, J., dissenting). When a claim of intergovernmental immunity cannot be established by reference to the "direct and obvious" effect of the challenged federal legislation upon the viability of the federal system, judicial intervention is inappropriate. See EEOC v. Wyoming, slip op. 13. In such cases, the courts should defer to the political process as the arbiter of the competing claims of the States' and the Nation. See Cox,

The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 199, 229-230 (1971). 5/

3. The third prong of the prevailing test for state immunity from federal commerce power regulation requires that a complaining state demonstrate that the challenged federal statute "directly impair[s] [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 288 (quoting National League of Cities, 426 U.S. at 852). A recurring problem in the application of this standard is to define "traditional governmental functions." It is our view that this standard for assessing immunity of state and local government functions should be essentially, if not exclusively, an historical one. This approach is most faithful to the clear intent of National League of Cities, most consistent with the analogous intergovernmental tax immunity doctrine, and truest to the federalism principle that underlies both doctrines.

In its opinion in National League of Cities, the Court pointedly characterized as "traditional" the governmental services that were held to be exempt from enforcement of the Fair Labor Standards Act. The Court stated that the impact of the challenged Fair Labor Standards Act amendments upon states' control of employment relations affecting "fire prevention, police protection, sanitation, public health, and parks and recreation" services was impermissible because "it is functions

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5/ We do not agree that this consideration can be dismissed simply because an adjudication involves a clash between federal authority and state or local prerogatives. Cf. EEOC v. Wyoming, slip op. 13 n.8 (Burger, C.J., dissenting). We note, for instance, that in determining whether a state statute denies due process of law -- a federal standard imposed upon the states by the Fourteenth Amendment -- the Court has looked to the political judgments of the states generally that are embodied in their laws. Statutes that follow an approach adopted by many states are more readily held to meet the federal standard of due process than idiosyncratic ones. Compare Schall v. Martin, No. 82-1248 (June 4, 1984), slip op. 13 n.16, with Addington v. Texas, 441 U.S. 418 (1979); see also Jones v. United States, No. 81-5195 (June 29, 1983), slip op. 15-16 & n.20.

such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens" (426 U.S. at 851; emphasis added). The Court added that its listing of exempt services was not "exhaustive," intimating that other services "well within the area of traditional operations of state and local governments" might qualify for similar treatment. 426 U.S. at 851 n.16 (emphasis added). And in overruling Maryland v. Wirtz, supra, the Court emphasized that the public schools and hospitals that were covered by the 1966 FLSA amendments that had been upheld in that case represent "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (426 U.S. at 855; emphasis added).

"Traditionally" simply is not synonymous with "generally" or "typically." If the repeated use of the qualifiers "traditional" and "traditionally" does not import a historical standard it is difficult to assign any meaning at all to these key terms. Our reading of National League of Cities is corroborated, moreover, by the Court's explanation that the holding of United States v. California, supra, remained good law because states historically have not regarded operation of a railroad as a governmental activity. 426 U.S. at 854 n.18.

Tracing National League of Cities to its doctrinal and precedential roots makes clear both that the Court intended to establish an essentially historical test and that such a test is a sound and workable one. The analysis employed in National League of Cities is largely derived from Justice Rehnquist's dissent in Fry v. United States, supra. Justice Rehnquist's opinion employs an essentially historical standard in delineating exempt state functions, distinguishing United States v. California, supra, from Maryland v. Wirtz (421 U.S. at 557-558; emphasis added):

> I would hold the activity of the State of California in operating a railroad was so unlike the traditional governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act. But the operation of schools, hospitals, and like facilities involved in Maryland v. Wirtz is an activity sufficiently closely allied with traditional state functions that the wages paid by the state to employees of such facilities should be beyond Congress' commerce authority.

Justice Rehnquist acknowledged that "[s]uch a distinction would undoubtedly present gray areas to be marked out on a case-by-case basis," and remarked that "[t]he distinction suggested in New York v. United States, 326 U.S. 572 (1946), between activities traditionally undertaken by the State and other activities" would be useful in resolving such cases (421 U.S. at 558 & n.2).

Both National League of Cities and Justice Rehnquist's dissent in Fry rely heavily upon the doctrine of partial state immunity from federal taxation. See 426 U.S. at 842-843, 854; 421 U.S. at 552-556. As noted above (page 6, supra), that doctrine, like the National League of Cities doctrine, rests ultimately upon the federal structure of our constitutional system. But the tax immunity of the states has not been extended to "revenue-generating activities of the States that are of the same nature as those traditionally engaged in by private persons." Massachusetts v. United States, 435 U.S. at 457 (opinion of Brennan, J.). See, e.g., New York v. United States, supra; Allen v. Regents, 304 U.S. 439 (1938); Helvering v. Powers, 293 U.S. 214 (1934); Ohio v. Helvering, 292 U.S. 360 (1934); South Carolina v. United States, 199 U.S. 437 (1905). 6/ In New York v. United States, Chief Justice Stone espoused an historical standard that would prevent the states from acquiring expanded

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6/ As Justice Brennan observed in Massachusetts v. United States, 435 U.S. at 457 & nn.14-15, cases prior to New York v. United States relied, at least in part, upon a distinction between governmental and proprietary functions, but that distinction was rejected by all Members of the Court in New York v. United States, whereas the historical standard appeared to represent the consensus of the Court.

tax immunity, and thus eroding the federal taxing power and tax base, by taking over activities formerly performed by the private sector (326 U.S. at 588-589; citations omitted):

> [I]mmunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax * * * gives merely an accustomed and reasonable scope to the federal taxing power. * * * The nature of the tax immunity requires that it be so construed so as to allow to each government reasonable scope for its taxing power[.] The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it. [7/]

Accordingly, an interpretation of the states' partial immunity from federal commerce power regulation that precludes the states from expanding that immunity and curtailing the effective reach of federal authority by assuming functions previously performed by the private sector is consistent with both the tax immunity doctrine and the principle of balanced federalism that links it to the National League of Cities doctrine. This Court's opinion in Long Island R.R. makes our point (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

As explained in our opening brief (at 41-42), because the Constitution does not treat the states and the Nation as co-equal sovereigns as to matters within federal authority, see FERC v. Mississippi, 456 U.S. at 761; Sanitary District v. United States, 266 U.S. 405, 425 (1925), this principle properly extends to all

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7/ Although Chief Justice Stone wrote for only four Members of the Court, the separate opinion of Justice Frankfurter, joined by Justice Rutledge, took a more restrictive view of state tax immunity. Only Justices Douglas and Black, in dissent, espoused a more expansive view of that immunity. See Massachusetts v. United States, 435 U.S. at 457-458 n.15.

cases where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area. Where state activities and patterns of operation are not entrenched prior to the enactment of federal legislation, federal requirements cannot be said to displace state decisions or disrupt settled patterns of organization, and do not imperil the vitality of the states. 8/

We recognize that, in Long Island R.R., 455 U.S. at 686, the Court stated that its emphasis on "traditional governmental functions and traditional aspects of state sovereignty" was not intended to "impose a static historical view of state functions generally immune from federal regulation." At the same time, the Court's holding that "federal regulation of a state-owned railroad simply does not impair a state's ability to function as a state" was predicated directly upon "the historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments" (455 U.S. at 686; emphasis added)). Thus we take the message of Long Island R.R. to be that a focus on the historic scope of state activity is ordinarily proper, not because of a mechanical preoccupation with the past, but because such an inquiry is best calculated to discover "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" (455 U.S. at 686-687 (citation omitted)).

The standard we have proposed does not, in fact, adopt a "static historical view of state functions" or freeze the states

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8/ Of course, even when state activities are expanded prior to the onset of federal regulation, other factors -- such as substantial federal financial or planning assistance in the enlargement of the states' roles -- may demonstrate that state sovereignty is not threatened by federal regulatory legislation.

in time so that only those activities performed when the Nation was founded qualify for protection under the intergovernmental immunity doctrine. Nor does it adopt any rigid across-the-board cutoff date for activities that are to be considered "traditional." Rather, the standard we espouse entails a more sensitive inquiry, one that turns upon whether the states had, prior to the initial enactment of federal regulatory legislation applicable to a particular field of service or activity, generally established themselves, with settled patterns of organization, as providers of the service. This standard allows the states ample latitude for experimentation with, and expansion of, their services, while it precludes erosion of federal authority and provides a workable and objective standard capable of ready application by the courts. It thus strikes a balance essential for the preservation of our system of constitutional federalism.

This standard also accords proper deference to Congress which, in enacting legislation, must be presumed to be sensitive to the prerogatives of state and local government and to the federal structure of our constitutional system. As explained above (pages 12-15, supra), although we do not suggest that "Tenth Amendment" claims are nonjusticiable, we believe that the operation of the national political process affords substantial protection for state interests, and that as a result judicial restraint is appropriate in this area. As indicated in our initial brief (at 49-51) respect for Congress militates especially strongly against adoption of a rule that would permit shifting patterns of state activity to undermine the constitutionality of federal statutes that were valid when enacted. In other words, the constitutionality of federal Commerce Clause legislation must be adjudged in terms of the state activities that were traditional at the time when the legislation was enacted.

Congress is the best equipped of the three branches of government to engage in the necessary kind of factfinding concerning patterns of political, social and economic organization, and the bearing that these have upon the provision of governmental services. The rule we suggest enables Congress to discharge its constitutional responsibility at the time it enacts legislation, free of the threat that its legislative product will, for reasons beyond its control, drift into a status of unconstitutionality at some unascertainable future time. Moreover, such a rule would entrust to Congress the task of periodically reviewing the corpus of enacted law to ascertain whether shifting patterns of state activity warrant any statutory change. Congress, unlike the courts, possesses not only the requisite capabilities for the task, but also, by its nature, the political sensitivity to "'accommodat[e] the competing demands' in this area" (United States v. New Mexico, 455 U.S. 720, 737-738 (1982), quoting Massachusetts v. United States, 435 U.S. at 456 (opinion of Brennan, J.)).

Judicial deference to Congress in this setting is not inconsistent with fundamental federalism principles. National League of Cities has two salient features. First, building upon earlier precedent, the Court announced the general principle that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary power to tax or to regulate commerce" (426 U.S. at 842). Second, the Court identified certain core functions that the federal government may not disrupt in the exercise of its Commerce Clause authority. Neither of the Court's holdings need be or should be disturbed. Within the constitutional framework established, however, the application of these principles to state government activities not explicitly addressed in National League of Cities will turn largely upon historical considerations, factual assessments and a careful weighing of competing state and federal

objectives. See pages 22-23, infra. These determinations will likely involve the kinds of fine-tuning and interest balancing that Congress -- composed of representatives of the States -- is particularly well-equipped to undertake. Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, No. 82-1005 (June 25, 1984), slip op. 27. 9/

4. The final element of the Virginia Surface Mining formulation for assessing claims of Tenth Amendment immunity is the "balancing test," which recognizes that, notwithstanding any intrusion upon state prerogatives, the nature of the federal interest underlying an Act of Congress that applies to state activities may override the states' sovereignty claim. We believe that the "safety valve" built into the intergovernmental immunity doctrine by the "balancing test" is essential to its validity. As Justice Blackmun observed in his concurring opinion in National League of Cities, 426 U.S. at 856, a balancing approach preserves paramount federal authority vis-a-vis the states "in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." In other words, where attainment of a statutory goal within the reach of Congress's commerce power requires a uniform legislative scheme, applicable to all who enter the regulated field of activity, vindication of Congress's plenary power to regulate commerce dictates that states, like others who enter the field, be bound by the federal enactment. The balancing test thus ensures that the intergovernmental immunity doctrine does not

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9/ Particularly when a fundamental constitutional principle has been elucidated by this Court, and Congress thereafter enacts legislation reflecting its assessment of the competing interests and pertinent legislative facts, special deference is due to these congressional judgments from courts that are called upon to apply the constitutional standard to the specific situation or circumstances addressed by Congress. See Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

serve to "impair a prime purpose of the Federal Government's establishment" (Case v. Bowles, 327 U.S. at 102).

Moreover, in assessing the nature of the federal interest, substantial deference is due to Congress's judgment that a uniform legislative scheme is necessary to secure the statutory objective. The railroad cases illustrate the principle. In Long Island R.R. the Court observed that "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system" (455 U.S. at 688). The Court concluded that, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system" (id. at 689; emphasis added). See also California v. Taylor, 353 U.S. 553, 567 & n.15 (1957). The Court has properly declined to second-guess these congressional determinations.

III

In our opening and reply briefs filed last Term we have explained why neither the doctrine nor the holding of National League of Cities controls this case; we do not undertake to repeat that discussion here. We think it useful, however, to highlight briefly the relevance of the foregoing general discussion to the relatively narrow question that must be decided in this case.

As we have previously detailed (Gov't Opening Br. 16-18), operation of transit services is not, by any measure, an established municipal service of long standing. Rather, it is the product of a dramatic shift within the last 20 years from provision of transit services almost exclusively by private enterprise to a mixed industry. That shift occurred only in the wake of establishment of a federal program providing massive

financial assistance to localities that took over private transit operations. That program was established by Congress in response to the urgent appeals of state and local officials who claimed that, without substantial federal aid, they would simply be unable to operate transit services. Congress agreed, finding that "[m]ass transportation needs have outstripped the present resources of the cities and the States; * * * that a nationwide program can substantially assist in solving transportation problems" (H.R. Rep. 204, 88th Cong., 1st Sess. 4 (1963)), and that without significant federal aid adequate mass transportation could not or would not be provided by the states and municipalities on their own (S. Rep. 82, 88th Cong., 1st Sess. 4-5 (1963)). See Gov't Opening Br. 26-32. In light of the traditional dominance of the local transit industry by the private sector, the recent entry of local government into the industry, and the critical role played by federal aid in establishing and maintaining the public sector, it seems beyond question that mass transit is not a traditional governmental function that must be exempted from non-discriminatory federal Commerce Clause legislation lest we jeopardize the vitality of the states.

It can scarcely be claimed, moreover, that the states generally had undertaken to provide mass transit services and had established settled patterns of organization in the field even by 1961 when the Fair Labor Standards Act was applied to the local transit industry, much less at an earlier time when the federal government began its regulation of employment in this area. Appellees have -- understandably -- never even suggested that the Fair Labor Standards Act Amendments that extended coverage to public transit employees were unconstitutional under the standards applied in National League of Cities when they were enacted in 1966. Thus, their argument depends entirely upon recognition of a rule of creeping unconstitutionality -- i.e.,

that political and economic developments subsequent to enactment of the challenged provisions rendered them no longer constitutional as of some unspecified date.

Appellees' argument highlights the unworkability of an ahistorical approach to claims of intergovernmental immunity. The rule proposed allows for no settled determinations by the courts, and permits no confidence on Congress's part that action within the "accustomed and reasonable scope [of] federal * * * power" (New York v. United States, 326 U.S. at 589 (Stone, C.J., concurring)) will be upheld as proper. Rather, questions of constitutionality of federal legislation affecting the states would be open to continual judicial reexamination, and the doctrine of intergovernmental immunity would function as a crude form of constitutional "sunset" legislation. We urge rejection of a constitutional rule founded on such shifting sands, with its attendant burdens upon the legislative and judicial branches.

For reasons discussed above, this is precisely the kind of case where deference to Congress's judgment is appropriate. Congress determined that the minimum wage and overtime provisions of the FLSA should be extended to public transit systems to prevent unfair competition. H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. 1487, 89th Cong., 2d Sess. 8 (1966). Appellees now claim that that determination is outmoded because of changed conditions in the transit industry. 10/ Absent the most unusual circumstances, such arguments should be addressed to Congress. And deference to Congress's judgment is particularly appropriate here, because, by all accounts, programs established by Congress played a vital role in making feasible widespread public sector participation in the local transit industry. Congress also carefully assessed the claims -- advanced here by

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10/ We note with interest the plans of the British government to reestablish local bus service as a private sector function. The Freedom Road, The Economist, July 14, 1984, at 58.

appellees -- that the overtime requirements of the FLSA create special hardships for transit operators. Congress concluded, based upon review of collective bargaining agreements in the transit industry, which almost uniformly required payment of overtime after 40 hours in a work week, that "the 'problems' of the 40-hour workweek pointed to by some segments of the industry have and are already being met and resolved by a substantial majority of the industry" (H.R. Rep. 93-913, 93d Cong., 2d Sess. 31 (1974)). 11/ Appellees have offered no reason for overriding Congress's considered determination on this matter. See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973).

11/ Appellees note that premium rates are frequently paid in the transit industry because of its scheduling practices (APTA Br. 21; NLC Br. 9-10). But contrary to the perhaps deliberately vague predictions of appellees (APTA Br. 21, NLC Br. 10), the requirements of the FLSA would not simply be superimposed upon any existing premium pay arrangements. The FLSA generally requires that an employee be paid 1-1/2 times his "regular rate" of pay for all hours worked in excess of 40 in a week. See 29 U.S.C. 207(a)(1). However, FLSA expressly provides for exclusion of various forms of "extra compensation" in establishing an employee's regular rate of pay. See, e.g., 29 U.S.C. 207(e)(5), (7), and such extra compensation is creditable towards the overtime pay required by the Act. 29 U.S.C. 207(h). Contrary to appellees' implication, it has never been determined in this case, or in any other forum, that existing premium pay arrangements must be treated as part of the "regular rate" to which overtime is applied. See Advisory Commission on Intergovernmental Relations, Mass Transit and the Tenth Amendment, Intergovernmental Perspective Fall 1985, at 17, 23. Indeed, it is safe to assume that appellees would resist any such ruling.

In any event, even if it were determined that existing premium pay arrangements in some cities are structured so as to be considered part of the "regular rate," the FLSA would not, as a practical matter, require that overtime be paid on the basis of such premium rates in the future. Because of the relatively high wage standards that are said to prevail in the transit industry generally (see NLC Br. 8) -- well in excess of the statutory minimum wage (see Gov't Opening Br. 8 n.12) -- it remains open to management and labor to renegotiate existing premium pay arrangements in light of the requirements of the FLSA to assure that aggregate compensation is not increased. Thus, the FLSA does not require transit operators to pay overtime in any different manner or amount than other employers are required to pay.

For the foregoing reasons, and the reasons set forth in our opening and reply briefs, the judgment of the district court should be reversed.

Respectfully submitted.

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Nos. 82-1913 and 82-1951

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,

Appellees.

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,

Appellees.

On Appeal From the United States District Court
For The Western District Of Texas

BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

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BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

In its Order of July 5, 1984, the Court requested the parties to this case to address the following question:

> "Whether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered?"

In Part I we urge an affirmative answer to that question.*/ National League held that considerations of state sovereignty, embodied in the Tenth Amendment, place "an affirmative limitation on the exercise of [Congress'] power" under the Commerce Clause, 426 U.S. at 845. But the text of the Constitution, the proceedings at the Constitutional Convention, the Federalist Papers, and the debates which led to the enactment of the Tenth Amendment all establish that National League has distorted the relationship between the Federal Government and the States which the framers of the Constitution intended to create. Pp. 3-11, infra. As Madison said:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with laws, or even the Constitution of the States. [II Annals of Cong. 1897 (Remarks of James Madison)]

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*In the briefs we filed last Term, we demonstrated that it is not necessary for the Court to overrule National League in order to reverse the judgment below and sustain the application of the Fair Labor Standards Act to public transit employees. We rest on that demonstration with respect to how this case should be decided under the principles of National League and its progeny.

National League is also contrary to the precedents in this Court which, beginning with Chief Justice Marshall's opinions in McCulloch v. Maryland, 4 Wheat 316 (1819) and Gibbons v. Ogden, 9 Wheat 1 (1824), have adhered to this fundamental principle. And from Sanitary District v. United States, 266 U.S. 405 (1925) (Holmes, J.) to Maryland v. Wirtz, 392 U.S. 183 (1968) (Harlan, J.), the Court consistently applied Madison's teaching with undiminished force when States were subjected to regulation under the Commerce Clause, scrutinizing such regulations to insure that they were, indeed, regulations of commerce and sustaining them if they passed that test. Pp. 11-19, infra.

The decisions which were cited in support of the decision in National League provide no support for the conclusion that Congress' delegated power to regulate commerce is diminished because a state, rather than a private party, is engaged in the activity which constitutes commerce. Pp. 19-25, infra. And the tax immunity doctrine on which National League relied not only is inapposite but, moreover, the troublesome history of that doctrine vindicates the framers' decision not to attempt to subordinate Congress' enumerated powers to considerations of state sovereignty. Pp. 25-32, infra.

Finally, to complete our showing, we demonstrate that even on its own terms, National League cannot withstand close analysis, for the limtations it places on Congress' power are lacking in logic and not susceptible to principled judicial application. Pp. 32-35, infra. For all these reasons we respectfully urge that National League be overruled.

In Part II we argue that even if National League's holding that there is a state-sovereignty restriction on Congress' commerce power were not overturned, the extent of that restriction should be limited in two respects. First, as we show in Part II(A), the States should not be immunized from federal regulation when they act as providers of goods or services. State activity creating goods and services is economic activity which can powerfully affect interstate commerce, and the entire point of the Commerce Clause is seriously jeopardized by denying Congress the power to regulate such activity. Moreover, the creation of goods and services is not an essential attribute of sovereignty; as to any given service, many entities that are not sovereign perform the service, and many entities that are sovereign do not. State sovereignty is secure so long as the law-making and law-enforcement functions (within the realm open to the States) are unimpaired. Pp. 37-48, infra.

Second, in Part II(B), we show that activities of political subdivisions should not be clothed with Tenth Amendment immunity. The Court has repeatedly held that the Eleventh Amendment -- which places an express limit on federal (judicial) power in order to protect state sovereignty -- does not afford any shelter to local governmental bodies. There is no greater reason for stretching the implied immunity of the Tenth Amendment beyond any natural boundary to protect such local entities. Pp. 48-50.

ARGUMENT

I. THE TENTH AMENDMENT PRINCIPLES OF NATIONAL LEAGUE OF CITIES V. USERY, 426 U.S. 833, SHOULD BE RECONSIDERED AND OVERRULED

A. In National League this Court held that Congress acted unconstitutionally in extending the Fair Labor Standards Act to various classes of state and local employees. 426 U.S. at 851. In so holding, the Court recognized that the FLSA amendments were "fully within the grant of legislative authority contained in the Commerce Clause, id. at 841, but concluded that the Act nonetheless "transgresses an affirmative limitation on the exercise of [Congress'] power," id. The Court explained:

> [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. [Id. at 845]

To the extent the Court identified a source for the limitation announced in National League that source was the Tenth Amendment, see id. at 842.

The premise of National League's holding was that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'" 426 U.S. at 844, quoting Texas v. White, 7 Wall. 700, 725 (1869). The validity of that premise cannot be denied. The framers of the Constitution clearly envisioned a federal system -- one in which both the federal government and the States possess sovereign authority.

The National League opinion proceeds on the theory that this premise carries with it two further propositions: first, that the framers must have intended that federal sovereignty is subject to being subordinated to state sovereignty -- in National League's words, that considerations of state sovereignty place "an affirmative limitation on the exercise of [Congress'] power" under the Commerce Clause; and second, that the framers intended to enforce this "affirmative limitation" by vesting the judiciary with a commission to invalidate laws enacted by the legislative branch which the judiciary views as unduly intrusive on state sovereignty. As we proceed to show those propositions are, in fact, entirely alien to the scheme of government the framers intended.

B. The Constitution carefully enumerates the powers that the framers intended to delegate to the federal government. The Tenth Amendment in terms makes explicit that which otherwise would be implicit in that enumeration -- that the federal government is to exercise only those powers that have been delegated, and that the powers not "delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But the text and structure of the Constitution contains no hint of the rule announced in National League that powers that are delegated to the federal government nonetheless are to be limited (through case-by-case judicial review) in the interest of preserving state sovereignty. To the contrary, Article VI of the Constitution declares that,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the constitution or Laws of any State to the contrary notwithstanding.

Moreover, the suggestion that the framers intended to subordinate federal power to concerns of state sovereignty fundamentally misconceives the very essence of the enterprise undertaken and carried through at the constitutional convention. The purpose of that convention, after all, was to replace the Articles of Confederation, which created merely a confederacy of sovereign states, with a national government to which each State would necessarily surrender certain sovereign powers. One of the first acts of the convention was to defeat the New Jersey plan, which would have "revised, corrected and enlarged" -- but not replaced -- the Articles of Confederation, and to instead embrace the Virginia plan which called for a "national Government . . . consisting of a supreme Legislative, Executive and Judiciary" (emphasis added).[1/] And at the convention the framers defeated a proposal which would have precluded Congress from "interfer[ing] with the government of the individual states in any matters of internal policy which respect the government of such states only, and wherein the general welfare of the United States is not concerned."[2/] Thus, as Professor

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1/ See W. Murphy, The Triumph of Nationalism 146 (1967); Diamond, What the Framers Meant by Federalism in R. Golden (ed.), A Nation of States 30-31 (1963).

2/ W. Murphy, supra n.1, at 179. Also indicative of the framers' views on the respective roles of the federal and state governments is the fact that a proposal to authorize Congress to "negative" (i.e., veto) any state law was defeated by only

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Scheiber has observed:

> The delegates . . . were willing to confront an inevitably powerful opposition to ratification based on the popular fear of centralized government, even at the risk of losing all, precisely because they thought all had been nearly lost already. National government under the Articles of Confederation, they thought, was a nullity incapable of pursuing the great purposes of nationhood.[3/]

The role that the framers envisioned the States would play within the federal system is revealed quite clearly in the writings and speeches of James Madison.[4/] In a letter to George

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2/ Continued

one vote, II M. Farrand (ed.), The Records of the Federal Convention, 391 (1911). Moreover, the opposition to negativing was based upon the fact that the amendment was "unnecessary," II id. at 390 (Mr. Sherman), 391 (Mr. Williamson and Mr. Gouvernor Morris) in light of the alternative protection of federal power in the Supremacy Clause which opponents of negativing had proposed earlier in the convention and which had been adopted, see I id. at 28-29. See also W. Murphy, supra, at 218-19; Scheiber, Federalism and the Constitution: The Original Understanding, in L. Friedman & H. Scheiber (eds.), American Law and Constitutional Order 89 (1978).

It is also noteworthy in this regard that the first Congress in drafting the Bill of Rights adopted recommendations that the States had made during the ratification process that were protective of individual rights, but rejected all recommendations that were aimed at enhancing state sovereignty at the expense of federal authority, such as proposals by New York, Massachusetts and Virginia to limit the federal taxing power to instances in which a State failed to provide revenue for the federal government and to limit the federal power to regulate congressional elections to instances in which a State failed to establish appropriate laws in that regard. See, W. Murphy, supra, at 337, 368, 385. See also n.20 infra.

3/ Scheiber, supra n.2 at 89. See also e.g., Diamond, supra n.1 at 37; W. Murphy, supra n.1; G. Wood, The Creation of the American Republic, 1776-1787 at 467 (1969).

4/ We focus on Madison's views in text because of his central role at the constitutional convention. Madison assumed that

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Washington shortly before the constitutional convention began, Madison stated his goal to be a "due supremacy of the national authority" which would "not exclude the local authorities wherever they can be subordinately useful." W. Murphy, supra n.1, at 63 (emphasis added). During the course of the convention Madison argued that "[w]ere it practicable for the General Government to extend its care to every requisite object without the cooperation of the State Governments the people would not be less free as members of one great Republic than as members of thirteen small ones" and that therefore even if there were to be "a tendency in the General Government to absorb the State Governments no fatal consequence could result." I Records of the Federal Convention, supra n.2 at 357. See also II id. at 463, 471. And while serving in Congress Madison stated (during the debates over the creation of the Bank of the United States):

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with laws, or even the Constitution of the States.[5/]

In The Federalist Papers Madison addressed at length the question whether "the powers transferred to the federal govern-

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role precisely because he had the faculty to articulate the majority's sentiments, as is made clear by Professor Murphy's thorough review of the views of the individual delegates. See W. Murphy, supra n.1, at 58-142.

5/ II Annals of Cong. 1897 (remarks of Madison). The Court quoted this statement as authoritative in Sperry v. Florida, 373 U.S. 379, 403 (1963) and in Reina v. United States, 364 U.S. 507, 512 (1960).

ment . . . will be dangerous to the portion of authority left in the several States."[6/] He answered that question in the negative, not because he believed that there were judicially-enforceable affirmative limitations on the exercise of the powers that were delegated to Congress (such as the limitation the Court discovered in National League) but rather because Congress' powers were limited to those enumerated in the Constitution and because of political constraints that Congress would face in exercising its enumerated powers. Madison stated the crux of his argument as follows:

> The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments [the federal and State governments] not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivate may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.[7/]

Madison added that while it was "beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States," if that were to change, "the people

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6/ The Federalist Papers, No. 45, p. 288 (Rossiter ed.). The question Madison posed reflected one of the two principal grounds of opposition to the proposed Constitution advanced by the anti-federalists. See W. Murphy, supra n.1, at 400.

7/ The Federalist Papers, supra n.6, No. 46, p. 294.

ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."[8/] Thus, as students of the constitutional debates consistently have concluded:

> [I]n the last analysis the settlement of conflicts between the states and Congress would have to be decided by the informal political process. When the framers took up the defense of the Constitution against Antifederalist critics during the ratification controversy, repeatedly they rested their case upon an estimate of how the political process would actually work.[9/]

8/ Id., No. 46, p. 295. See also id., No. 17, pp. 118-119 (A. Hamilton) ("the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control" any tendency of Congress to "abolish" the States' "residuary authority"); No. 31, p. 197.

Madison had made the same argument at the constitutional convention itself:

> In some of the States, particularly in Connecticut, all the Townships are incorporated and have a certain limited jurisdiction. Have the Representatives of the people of the Townships in the Legislature of the State ever endeavored to despoil the Townships of any part of their local authority? As far as this local authority is convenient to the people they are attached to it; and their representatives chosen by and amenable to them (naturally) respect their attachment to this, as much as their attachment to any other right or interest. [I The Records of the Federal Convention, supra n.2, at 356]

To protect the states' ability to compete within the political arena, the framers established certain constitutional safeguards, most notably the provision for a Senate to be composed of two representatives of each State, chosen by the State legislature. Roger Sherman argued for "the equality of votes not so much as security for the small states, as for the state governments," I id. at 200. See also I id. at 161 (George Mason).

9/ Scheiber, supra n.2, at 89. See also e.g., W. Murphy, supra n.1, at 403 ("When the Anti-federalists . . . lamented the lack of constitutional limitations on the power of the national government to keep it from overwhelming the state governments,

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Finally, in light of the stress that National League and the subsequent cases have placed on the Tenth Amendment, we emphasize that nothing in that Amendment was intended to alter the framers' original understanding or to impose new limits on Congress' power. As previously noted -- and as this Court has repeated stated, see pp. 11-15, infra -- the language of the Amendment does not permit such a reading. And the "legislative history" of the Amendment is equally clear. Indeed, in proposing the Tenth Amendment at the first Congress Madison explained:

9/ Continued

the main answer of the Federalists was to point to those features of the Constitution which afforded political limitations on the exercise of national powers"); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 558 (1954) ("For the containment of the national authority, Madison did not emphasize the function of the Court; he pointed to the composition of Congress and to the political processes.").

In EEOC v. Wyoming, ____ U.S. ____, 103 S. Ct. 1054 (1983), Justice Powell, in dissent, reached a conclusion quite at odds from all of the historians just cited. Pointing to various assertions by the States during the pre-Civil War period of an authority to override federal law -- for example, the Kentucky and Virginia resolutions adopted by the legislatures of those States in 1798 to protest the Alien and Seditions Acts and the nullification doctrine expounded by John Calhoun -- Justice Powell concluded that these assertions evidenced the framers' intent for "the reserved powers of the States [to] limit[] the delegated powers of the National Government." Id. at 1079. But, notably, in the incidents to which Justice Powell referred that was not the claim the States made; rather the States claimed that their authority was superior to Federal authority. As Justice Powell ultimately acknowledges in his dissent -- and as the Court squarely held in Texas v. White, supra, on which National League ironically relied, see pp. 19-20, infra -- these assertions of state supremacy were not "constitutionally sound," 103 S. Ct. at 1079 n.8; indeed they were the very antithesis of the system the framers had intended to create. As Madison wrote, "[a] plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imagined" than "a nullification of a law of the U.S." by a single State. 9 The Writings of James Madison 575 (Hunt ed. 1910).

> I find from looking into the amendments proposed by the State conventions that several are particularly anxious that it should be declared in the Constitution that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it. [History of Cong. 441 (June 8, 1789)][10/]

Significantly, the only controversy that the Tenth Amendment engendered was over a proposal, recommended by Massachusetts during the ratification process and advanced on three occasions in Congress, to provide that powers not "expressly" delegated to the federal government be reserved to the States.[11/] "Madison objected to this proposal, because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication unless the Constitution descended to recount every minutiae." I Annals of Cong. 790. Madison's position prevailed, and the word "expressly" was not included in the Amendment. Commenting on this history, Justice Story concluded:

> It is plain . . . that it could not have been the intention of the framers of this amendment to give it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental.

10/ During the debate in Virginia over ratifying the Constitution -- before the Tenth Amendment had been added -- Madison argued that it was "obviously and self-evidently the case that every thing not granted is reserved." III S. Elliot (ed.), The Debates in the Several State Conventions on the Adoption of the Federal Constitution 565 (1836).

11/ See A. Mason, The States Rights Debate 94 (1964); W. Murphy, supra n.1 at 337 (Massachusetts).

> Its sole design is to exclude any interpretation, by which other powers should be assumed beyond which are granted. . . . The attempts, then, which have been made from time to time, to force upon this language an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly;" to qualify what is general, and obscure, what is clear, and defined. [3 J. Story, Commentaries on the Constitution of the United States 753-54 (1st ed. 1833)]

C. For over one hundred and fifty years the principles just set forth -- that federal power, where it exists, is supreme and that the safeguard for state sovereignty lies in the political process, and not the judicial -- prevailed in this Court's decisions concerning the scope of Congress' power under the Commerce Clause. As Justice Brennan in his dissenting opinion demonstrated, and we now recapitulate, National League represented a sharp departure from these precedents.

The Court first addressed the subject at length in McCulloch v. Maryland, 4 Wheat 316 (1819). In that case Chief Justice Marshall declared the principle that controlled until National League:

> If any one proposition could command the universal assent of mankind, we might expect it would be this -- that the government of the Union, though limited in its powers, is supreme within its sphere of action. [Id. at 405]

And Chief Justice Marshall stated too that the Tenth Amendment was "framed for the purpose of quieting the excessive jealousies which had been excited" and

> declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus

> leaving the question whether the particular power which might become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair constitution of the whole instrument. [Id. at 406]

In Gibbons v. Ogden, 9 Wheat 1 (1824), the Court, again speaking through Chief Justice Marshall, reaffirmed the teaching of McCulloch: "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects," and thus Congress' "power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government." 9 Wheat at 197. Echoing the argument of The Federalist Papers as to the source of the limitation on Congress' ability to exercise its enumerated powers the Court declared:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to save them from its abuse. They are the restraints on which the people must often rely solely, in all representational governments. [9 Wheat at 197]

The principles stated in McCulloch v. Maryland and Gibbons v. Ogden were consistently followed thereafter by this Court with one possible exception.[12/] There was a relatively brief

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12/ For example, in Northern Securities Co. v. United States, 193 U.S. 197 (1904), the first Justice Harlan, writing for the Court, rejected the argument that federal regulation of a State-chartered corporation invaded the States' reserved authority under the Tenth Amendment:

> We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress in regulating interstate commerce, must act in subordination

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period of time during which the Court read Congress' powers under the Commerce Clause quite narrowly; Hammer v. Dagenhart,

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12/ Continued

> to the will of the states when exerting their power to create corporations. No such view can be entertained for a moment.
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> * * *
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> Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the national government over matters committed to it. [Id. at 345]

One year earlier, Justice Harlan, had made the same points in The Lottery Case, 188 U.S. 321, 356-57 (1903). See also e.g., United States v. Harris, 106 U.S. 629, 636 (1883) ("Whenever . . . a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided."); In re Rahrer, 140 U.S. 545, 562 (1891) ("The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge"); Hoke v. United States, 227 U.S. 308, 320 (1913) ("The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or states is not material to be considered. It is the supreme law of the land, and persons and states are subject to it." (emphasis added); The Minnesota Rate Cases, 230 U.S. 352, 399 (1913) (the Constitution reserves to the States "only . . . that authority which is consistent with and not opposed to the grant to Congress."); United States v. Sprague, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified."); Wickard v. Filburn, 317 U.S. 111, 120 (1942) ("effective restraints on [the commerce clause power's] exercise must proceed from political rather than judicial processes.")

The same principles were consistently applied by the Court in addressing the scope of other powers of Congress. For example, in Wright v. Union Central Ins. Co., 304 U.S. 502, 516 (1938), the Court held that "[i]n view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment." In Ashwander v. TVA, 297 U.S. 288, 330

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247 U.S. 251 (1918), which invalidated a federal child labor law, is the leading case from that era. In that case, the Court buttressed its argument that Congress had exceeded its authority under the Commerce Clause by invoking the Tenth Amendment, see id. at 274, 275-76 (although the Court did not there suggest, as National League was later to hold, that a law that was a proper regulation of commerce could nonetheless violate the Tenth Amendment).

The Hammer v. Dagenhart era was short-lived; in United States v. Darby, 312 U.S. 100 (1941) the Court expressly overruled Dagenhart, rejecting both its cramped reading of the Commerce Clause, and its misplaced reliance on the Tenth Amendment. With respect to the latter point the Court in Darby stated:

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

12/ Continued

(1936), the Court concluded that "to the extent that the power of disposition is . . . expresly conferred, it is manifest that the Tenth Amendment is not applicable. And in Sperry v. Florida, supra, a case involving the patent power, the Court stated:

> Congress having acted within the scope of the powers "delegated to the United States by the Constitution," it has not exceeded the limits of the Tenth Amendment despite the concurrent effect of its legislation upon a matter otherwise within the control of the State. [373 U.S. at 403]

See also James Everard Breweries v. Day, 265 U.S. 545, 558 (1924).

> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. [312 U.S. at 124]

D. The foregoing cases all involved federal regulation of private individuals, in which a claim was made that Congress had invaded powers reserved to "the people" or had infringed upon state sovereignty by overturning state law. The principles developed in those cases were -- until National League -- likewise consistently applied by the Court to federal regulation of the "States as States," no less than to federal laws displacing state regulation of private individuals.

The seminal case is Sanitary District v. United States, 266 U.S. 405 (1925). At issue in that case was the power of the federal government to limit the amount of water that the State of Illinois could withdraw from Lake Michigan; Illinois argued that its need was "to take care of the sewage and drainage of Chicago," id. at 424, and that "great evils . . . would ensue if the flow were limited," id. The Court nonetheless unanimously sustained the federal law. Writing for the Court Justice Holmes noted that Congress had acted pursuant to its authority "to remove obstructions to interstate and foreign commerce," and he explained that,

> [T]here is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants. In matters where the states may act, the action of Congress overrides what they have done. [Id. at 426]

Justice Holmes added: "This is not a controversy between equals." Id. at 425. See also Board of Trustees v. United

States, 289 U.S. 48 (1933) (Hughes, C.J.) (foreign commerce).

The Court returned to the subject in United States v. California, 297 U.S. 175 (1936), in which the question was Congress' power to regulate a state-run railroad. The Court, per Stone, J., unanimously sustained that power:

> That in operating its railroad [California] is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. [Id. at 183-84; emphasis added]

Justice Stone added that "there is no . . . limitation upon the plenary power to regulate commerce," and that "[t]he state can no more deny the power if its exercise has been authorized by Congress than can an individual." Id. at 185. See also California v. Taylor, 353 U.S. 553 (1957); Parden v. R. Terminal Co., 377 U.S. 184 (1964).13/

13/ In National League the Court termed the last quoted sentence from United States v. California "dicta," 426 U.S. at 854, and disapproved that sentence as "simply wrong," id. at 855. The National League Court purported not to disapprove of the "holding" of California, which the Court understood as follows:

> There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce. . . ." 297 U.S. at 182. [426 U.S. at 854 n.18]

In fact, however, Justice Stone's opinion for the Court in California expressly declined to base the decision on the nature of the activity in which the State was there engaged. See 297 U.S. at 183 ("we think it unimportant to say whether

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Other cases likewise have sustained Congress' power to regulate the States as States. In Oklahoma v. Atkinson Co., 313 U.S. 508 (1941), the Court sustained Congress' power to build a dam which would flood 3,800 acres of state-owned land which was being used by the state "for school purposes, for a prison farm, for highways, rights of way and bridges." Id. at 511. The Court concluded that the issues raised by the State "raise not constitutional issues but questions of policy." Id. at 527. In California v. United States, 320 U.S. 577 (1944), the Court upheld federal regulation of state-owned waterfront terminals, stating that "it is too late in the day to question the power of Congress to regulate such an essential part of interstate and foreign trade . . . whether they be activities and instrumentalities of private persons or of public agencies." Id. at 586. And in Case v. Bowles, 327 U.S. 92 (1946), the Court concluded that Congress constitutionally had included the States within the reach of the Emergency Price Control Act, rejecting the

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13/ Continued

the state conducts its railroad in its 'sovereign' or its 'private' capacity"); id. at 185 (refusing to decide whether operating a railroad is an "activit[y] in which the states have traditionally engaged").

The unanimity of California is especially impressive since United States v. Butler, 297 U.S. 1 (1936), had been decided just four weeks earlier, and Carter v. Carter Coal Co., 298 U.S. 238 (1936) was decided later at the same Term. Yet even the Justices who read the Commerce Clause narrowly in Butler and Carter Coal -- four of whom were later to bitterly resist what they regarded to be an unwarranted expansion of the commerce power in Labor Board v. Jones & Laughlin Corp., 301 U.S. 1 (1937) -- considered it to be entirely consistent with state sovereignty that the States should be subject to the commerce power to the same extent as private individuals.

State's Tenth Amendment claim on the ground that "the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government.'" Id. at 102; see also id. at 101.[14/]

Finally, in Maryland v. Wirtz, 392 U.S. 183 (1968), the Court, sustained federal power to apply the Fair Labor Standards Act to state employees. Summarizing the principles that had been developed over the preceding four decades, Justice Harlan stated:

> There is no general "doctrine implied in the Federal Constitution that the 'two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'" Case v. Bowles, 327 U.S. 92, 101.
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> [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulation of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the States too may be forced to conform its activities to federal regulation. [Id. at 195, 196.]

National League remarkably cites Wirtz for the proposition that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by

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14/ Although National League distinguished Case's Tenth Amendment discussion as limited to the war power, see 426 U.S. at 844-855, n.18, the Case opinion itself states a general proposition disapproving the petitioner's reliance on the Tenth Amendment and nowhere suggests such a distinction. Moreover, the distinction is untenable, as has been clear since Gibbons v. Ogden, which equated Congress' commerce and war powers. See 9 Wheat. at 197, quoted at p. 12, supra.

Art. I of the Constitution." 426 U.S. at 842. But, as unmistakably appears, the assurance that the Court has "ample power to prevent . . . 'the utter destruction of the state as a sovereign political subdivision,'" 392 U.S. at 196, was based on "the constitutional differentiation" between activities which are and which are not "commerce with foreign nations and among the several states," id. The distinction between this legitimate constitutional protection for the States, and the doctrine adopted in National League was emphazied by Justice Harlan at the conclusion of Wirtz's constitutional analysis:

> This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens. [392 U.S. at 198-199]

Justice Harlan's statement that "[t]he Court will not carve up the commerce power" echoes Madison's injunction at the constitutional convention: "the regulation of Commerce [is] in its nature indivisible and ought to be wholly under one authority." II The Records of the Federal Convention, supra, n.2, at 625.

E. The National League opinion not only failed to treat adequately with the abundant precedent which was contrary to the Court's conclusion, but relied heavily on language from decisions which provide no support for that conclusion. We briefly examine those decisions in chronological order.

National League first cited Texas v. White, 7 Wall. 700, 725 (1869), for the proposition that "[t]he Constitution, in all

its provisions, looks to an indestructible Union, composed of indestructible States." But Chief Justice Chase made that point in Texas v. White in the course of answering in the negative "the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States." Id. at 724. In short, the sentence quoted in National League forcefully asserts the incontestable proposition that the Constitution establishes a federal system to which the States are irrevocably bound. That sentence says nothing about the respective powers of the Union and of the States in that federal system; Chief Justice Chase spoke to that issue in an earlier sentence in the same paragraph:

> Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. [7 Wall. at 725).

Thus, Texas v. White did not imply, let alone decide, that Congress' delegated powers must in any way yield to the sovereignty of the States.[15/]

National League next cited Lane County v. Oregon, 7 Wall. 71, 76 (1869) for the declaration that "in many articles of the Constitution the necessary existence of the States, and, within their proper sphere, the independent authority of the States,

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15/ It cannot be denied, however, that even prior to National League, Texas v. White had been cited for that proposition. See Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936); Ashton v. Cameron County Dist., 298 U.S. 513, 528 (1936); Steward Machine Co. v. Davis, 301 U.S. 548, 598, 611 (1937) (McReynolds, J., dissenting).

is distinctly recognized" (emphasis added). In the Lane County opinion the Court elaborated upon the"proper sphere" of the States vis-a-vis the federal government:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. [Id.]

The Lane County Court also made clear that the States' power to tax its own citizens:

> is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. [Id. at 77][16/]

Third, the National League Court cited Coyle v. Oklahoma, 221 U.S. 559 (1911), which declares that the "power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers." Id. at 565. But all that Coyle held is that Congress' authority under Article IV § 3 to admit new States into the Union does not empower the national legislature to impose conditions on admission whereby the new State would be on other tnan an equal footing with the other States, and that therefore Congress exceeded its powers under Article IV, § 3 of the Constitution by limiting Oklahoma's power to determine the

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16/ In Florida v. Mellon, 273 U.S. 12, 17 (1927), Justice Sutherland for a unanimous Court, cited Lane County, among other cases, for the rule that:

> Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.

location of its state capitol in the Act enabling Oklahoma to become a State. In so construing Article IV § 3 (in accordance with much earlier precedent) the Court performed the function of determining the scope of one of Congress' powers delegated in Article I, in the same manner, for example, as the Court acts in determining what is "commerce" for purposes of Article I, § 8, cl. 3. And Coyle expressly recognized that while Congress could not impose a condition on a new State by virtue of its control over admission in Article IV § 3, the national legislature could do so as a regulation of commerce because that would be within Congress' delegated powers.17/

17/ The Court said:

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but soley because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Williamette Bridge Co. v. Hatch, 125 U.S. 1, 9. Pollard's Lessee v. Hagan, [3 How. 212, 230]
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> No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. [221 U.S. at 574]

The National League opinion relied also on two tax immunity opinions, both written by Chief Justice Stone: Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) and New York v. United States, 326 U.S. 572 (1946) (plurality opinion). Prior to National League, however, that doctrine was considered to be sui generis, and to provide no analogy which would create an intergovernmental immunity from exercise of the interstate and foreign commerce power. Chief Justice Stone himself made the point in United States v. California, supra, 297 U.S. at 185: "We look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce."[18/]

National League does not, to be sure, push the tax immunity analogy to the limits of its illogic. Rather than applying the tax immunity doctrine to all of Congress' Article I power, the Court there "express[ed] no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1," 426 U.S. at 852 n.17, and the Court distinguished Case v. Bowles, supra, as a "war power" case, 426 U.S. at 854-855, n.18.[19/] (That

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18/ That there are differences between the commerce clause and tax powers has been clear since at least Gibbons v. Ogden, supra. See 9 Wheat at 199-201.

19/ Subsequently, in Japan Line Ltd. v. County of Los Angeles,

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distinction is without basis in the Case opinion and is unsound in principle, see p. 18 n.14, supra.) The National League opinion fails, however, to explain why the intergovernmental tax immunity doctrine should be extended to limit the power to regulate interstate commerce but not to limit other powers delegated in Article I. And that extension is especially difficult to justify when it is recalled that "[n]o other federal power was so universally assumed to be necessary [as the commerce power], no other state power was so readily relinquished." H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533-534 (1949). See also EEOC v. Wyoming, supra, 103 S. Ct. at 1054, 1065 (Stevens, J., concurring); National League, 426 U.S. at 864-865 n.6 (Brennan, J., dissenting).

National League cited as well United States v. Jackson, 390 U.S. 570 (1965), and Leary v. United States, 395 U.S. 6 (1969), which held that Congress' exercise of the commerce power is subject to the provisions in the Bill of Rights which in terms limit the powers of the national government. The only constitutional provision on which National League rests, however, is the Tenth Amendment (see p. 2, supra), which, in terms, does not limit any of the delegated powers, but is declarative of the principle of federalism -- that powers which have not been

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19/ Continued

441 U.S. 434, 449 n.13 (1979), the Court said, "It has never suggested that Congress' power to regulate foreign commerce could be so limited [as in National League]."

delegated to the federal government are reserved to the States or the people.

Fry v. United States, 421 U.S. 542 (1975), the only other decision cited in National League, contains a footnote which does broach a broader view of the Tenth Amendment. The Court said that the "Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Id. at 547, n.7. Since it was not necessary for decision -- the Court followed Wirtz, and sustained an exercise of the commerce power against the States -- the Fry footnote did not give further content to that "constitutional policy." That statement in an opinion issued on the same day that National League was set for reargument was truly "dicta", and if intended to give substantive scope to the Tenth Amendment is inconsistent with all the precedents discussed at pp. 11-18, supra.

F. While as we have just shown the tax immunity doctrine does not justify a commerce clause immunity doctrine, the former does warrant close separate examination, for its history reveals the futility of judicial attempts to impose principled and workable limitations on an enumerated power of Congress.

The rule that states enjoy some measure of constitutional immunity from federal taxation was first announced in Collector v. Day, 11 Wall. 113 (1871), in which the Court held that the income of a state judge could not be taxed by the federal

government.[20] The Court in that case expressed concerns strikingly similar to those voiced in National League: the States "are separable and distinct sovereignties," id. at 124, their "unimpaired existence . . . is . . . essential," id. at 127, and they "should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax," id. at 125-26. Based on those concerns, the Court held that "the means and instrumentalities employed by . . . [state] government to carry into operation . . . their reserved powers" to be "exempt from Federal taxation." Id. at 127.

Over the next several decades, the Court searched for principled means to cabin the immunity principle announced in Collector v. Day (just as this Court in the past eight years has searched for principled means of limiting National League's regulatory immunity). Specifically the Court attempted to limit the immunity to traditional/governmental, as distinguished from non-traditional/proprietary activities of state governments, and on that basis sustained federal taxes on: state-run liquor oper-

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20/ There is a certain irony in the holding of Collector v. Day. At the constitutional convention -- and in the subsequent ratification debates -- the issue in dispute with respect to the taxing power was whether the federal government should have authority to tax the people directly; the anti-federalists urged that the federal government's taxing authority should be addressed to the States (as States) -- and not to the people -- and that authority to tax the people should exist only "in the case of the non-compliance of a State, as a punishment for its delinquency." III Records of the Federal Convention, App. A., CLVIII, at 205. Indeed, three States, in ratifying the Constitution, called for such a limitation on the taxing power to be added to the Bill of Rights, but those calls were not heeded. See W. Murphy, supra n.1, at 337, 368, 385.

ations, South Carolina v. United States, 199 U.S. 437 (1905); Ohio v. Helvering, 292 U.S. 360 (1934); and state-run transit operations, Helvering v. Powers, 293 U.S. 214, 225 (1934).21/

In Helvering v. Gerhardt, 304 U.S. 405 (1938), the Court took a large step away from the principle of Collector v. Day and the tax immunity doctrine. The holding of Gerhardt was narrow enough: the income of employees of Port of New York Authority, a bi-state corporation created by compact between two states, was subject to federal taxation. But the reasoning of Gerhardt represented a striking retreat from Collector v. Day:

> There are cogent reasons why any constitutional restriction upon the taxing power granted to Congress, so far as it can properly be raised by implication, should be narrowly limited. One . . . is that the people of all the states have created in the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are

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21/ The Court likewise recently has stated that "[i]t is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause power when they are engaged in proprietary activities." Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, ____ U.S. ____, 103 S. Ct. 1011, 1014 n.6 (1983); see also Transportation Union v. Long Island R.R. Co., 455 U.S. 678, 685 n.11 (1982) ("the running of a business enterprise is not an integral operation in the area of traditional government functions"); Reeves Inc. v. Stake, 447 U.S. 429, 439 (1980) ("state proprietary actions may be, and often are, burdened with the same restrictions imposed on private market participants"). And, of course, the National League holding is limited to "traditional operations of state and local governments." 426 U.S. at 851 n.16. See e.g. Transportation Union, supra, 455 U.S. at 686 (sustaining federal regulation of labor management relations of state-owned railroad because "the operation of a railroad is not among the functions traditionally performed by state and local governments" (emphasis in original).

We discuss the problems this limitation poses infra at 38-40.

> taxing themselves serves to guard against its abuse through the possibility of resort to the usual processes of political action which provide a readier and more adaptable means than any which courts can afford for securing accommodation of the competing demands for national revenue on the one hand and a reasonable scope for the independence of state action on the other.
>
> Another reason [for limiting tax immunity] rests upon the fact that any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. [304 U.S. at 416]

One year later, Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939), expressly "overruled" Collector v. Day "so far as [it] recognize[d] an implied constitutional immunity from income taxation of the salaries of officers or employees of . . . a state government or [its] instrumentalities." Id. at 486. The Court reaffirmed the teaching of Gerhardt "that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted." Id. at 483. And the Court concluded that the fact that at least part of "the burden of a non-discriminatory general tax upon the incomes of employees of a government . . . may be passed on economically to that government, through the effect of the tax on the price level of labor or materials," id. at 487, is an insufficient basis for finding an infringement of sovereignty.

New York v. United States, 326 U.S. 572 (1946), represents a still further retreat. The Court there sustained the application to New York of a tax on the sale of mineral water, and in so doing rejected as "untenable" the distinction previously

drawn between traditional/governmental and nontraditional/proprietary state functions. Id. at 580 (Frankfurter, J.); see id. at 586 (Stone, J., concurring). Justice Frankfurter explained:

> To rest the federal taxing power on what is "normally" conducted by private enterprises in contradiction to the "usual" governmental functions is too shifting a basis for determining a constitutional power and too entangled in expediency to serve as a dependable legal criterion. [Id. at 580][22]

Finally, in Massachusetts v. United States, 435 U.S. 444 (1978), the most recent tax immunity decision the Court, while divided over what, if anything, remains of the tax-immunity

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22/ Justice Frankfurter put the point this way in his opinion for the Court a few years later in Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955): the governmental-proprietary distinction is "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."

Although the Court in New York v. United States agreed on the inadequacy of the prior lines that had been drawn to define the States' tax immunity, the Court was unable to arrive at a majority position as to a new line. In his opinion announcing the judgment of the Court, Justice Frankfurter urged that the appropriate rule was that "so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on the State." 326 U.S. at 582. Justice Stone, in a concurring opinion which three other Justices joined, argued that Justice Frankfurter's non-discrimination principle was insufficiently protective of state sovereignty because that principle might permit

> a general non-discriminatory real estate tax . . . or an income tax laid upon citizens and States alike [to be] applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands . . . . [Id. at 588]

Justice Stone concluded that such hypothetical taxes would be unconstitutional because they would "unduly interfere[] with the performance of the State's functions of government." Id.

doctrine, concluded that "[a] nondiscriminatory taxing measure that operates to defray the costs of a federal program by recovering a fair approximation of each beneficiary's share of the cost" -- in that case a registration tax on aircraft -- is plainly constitutional as applied to the States. Id. at 460. The Court acknowledged that application of the tax to the State "will increase the cost of the state activity," but the Court reaffirmed that "an economic burden on traditional state functions without more is not a sufficient basis for sustaining a claim of immunity." Id. at 461.23/

The tax immunity cases teach two lessons that are especially relevant here. First, of course, those cases highlight the difficulty of the task the Court attempted in Collector v. Day with respect to the taxing power and in National League with respect to the commerce clause power: imposing principled and workable limits -- not contained in the Constitution itself --

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23/ Contrast the teaching quoted in text from Massachusetts v. U.S. and from Graves v. New York (at p. 28, supra) with the Court's attempt in EEOC v. Wyoming, supra, to distinguish National League:

> The most tangible consequential effect identified in National League of Cities was financial: forcing the States to pay their workers a minimum wage and an overtime rate would leave them with less money for other vital state programs. . . . In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances. [103 S. Ct. at 1062-63]

The dissent in EEOC v. Wyoming argued that a principal constitutional vice in the application of the ADEA to the States was the economic burden placed upon the States. See id. at 1070-71 (Burger, C.J., dissenting).

on an enumerated congressional power. Second, and equally important, the experience with federal taxation of the States confirms the wisdom of the point that Madison made in The Federalist Papers, and that the Court made in Helvering v. Gerhardt, supra: "the usual processes of political action . . . provide a readier and more adaptable means than any which courts can afford for securing accommodation of the competing demands" of the national and state governments. Gerhardt, supra, 304 U.S. at 416. For the fact of the matter is that, during the almost 80 years prior to Collector v. Day, the 70 years that that decision was good law, and, the almost 40 years since New York v. United States left the law in this area uncertain, the only federal taxes Congress ever has enacted that this Court has found to be unduly intrusive on state sovereignty were taxes on the income of state employees, and not even the most ardent advocate of state sovereignty would any longer contend that such nondiscriminatory income taxes are unconstitutional. Congress' prudence in exercising the taxing power demonstrates the wisdom of Justice Frankfurter's caution:

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. [New York v. United States, supra, 326 U.S. at 583]

The ultimate message of the tax immunity cases, is that, as Madison predicted, the political process provides a more than adequate check on Congress and that the judicial process is not competent to provide additional restraints on Congress'

exercise of its enumerated powers.[24/]

G. This conclusion is confirmed by a close analysis of the decision in National League itself. For the limitations that the Court placed on the rule of immunity there announced further demonstrates that, in Justice Frankfurter's words:

> Any implied limitation upon the supremacy of the federal power . . . brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the pro- fessional training and special competence of judges. [New York v. United States, supra, 326 U.S. at 581]

The first limitation of National League was announced in the second paragraph of the Court's analysis in that case: notwithstanding any concerns of state sovereignty, Congress is empowered to enact laws that override (i.e., preempt) "express state law determinations." 426 U.S. at 840; see id. at 845. In Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290 (1981), the Court developed the point further:

24/ As one commentator has persuasively observed:

> The ultimate issue is not whether the national political process protects federalism interests perfectly. Indeed, in the nature of things mistakes inevitably will be made. The real question is whether judicial intervention is likely to rectify those mistakes without multiplying them. If state interests could be identified objectively we might be able to say with confidence that Congress had ignored a real state interest, and that therefore a judicial role would not entail great risks. But . . . it seems that the risk of judicial error is quite high in light of difficulties in devising appropriate doctrines limiting Congress' power.

Tushnet, Constitutional and Statutory Analyses in the Law of Federal Jurisdiction, 25 U.C.L.A. L. Rev. 1301, 1335 (1978).

> Although such congressional enactments obviously curtail or prohibit the States' perogative to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.[24a/]

Yet in elaborating National League the Court has recognized that "'the authority to make . . . fundamental decisions' is perhaps the quintessential attribute of sovereignty. Indeed having the power to make decisions and to set policy is what gives the State its sovereign nature." FERC v. Mississippi, 456 U.S. 742, 761 (1982). The upshot is that under what one commentator terms "the curious doctrine of National League of Cities,"[25/] the State is not acting "as a State" -- and hence is subject to being overriden by Congress -- when engaging in a "quintessential" excercise of sovereignty, but is acting as a State, and is immune from federal regulation, when fixing the wages of its employees.[26/]

24a/ See also Fidelity Federal S&L Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail").

25/ Alfange, Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming, 1983 Sup. Ct. Rev. 215, 228-29, 232 (1983); see also L. Tribe, American Constitutional Law 311-12 (1978); Tushnet, supra n.24, at 1340.

26/ Of course in many States the fixing of wages is done by legislation, and thus National League necessarily exalts for Supremacy Clause purposes some state laws over others.

The second limitation on National League results from the Court's distinction of its decision one Term earlier in Fry v. United States, supra, which had sustained Congress' power to temporarily freeze the wages of state and local government employees. The National League Court explained that the ceiling on wages produced by the freeze at issue in Fry was constitutionally different from the floor established by the FLSA because the wage freeze "was occasioned by an extremely serious problem," "displaced no state choices as to how governmental operations should be structured," and "operated to reduce the pressures upon state budgets rather than increase them." 426 U.S. at 853.[27/] On similar grounds, the Court in EEOC v. Wyoming, supra, sustained the application of the Age Discrimination in Employment Act to state employees performing what the Court viewed to be "clearly a traditional state function," 103 S. Ct. at 1062, as the Court found that "the degree of federal intrusion" involved in precluding the states from basing their employment decisions on the age of employees (or applicants for employment) "is sufficiently less serious"

27/ The force of the latter distinction is considerably undermined because National League did "not believe [that] particular assessments of actual impact are crucial to the resolution of the issue . . . ." 426 U.S. at 851. This was said to be so because the FLSA amendments in any event "significantly alter[ed] or displace[d] the states' abilities to structure employer-employee relationships . . . ." Id. But the statute at issue in Fry significantly interfered with such structuring because, as was pointed out on petitioners' side in that case, a wage freeze undermines the States' ability to recruit employees and thereby seriously and adversely affects the quality of government operations.

than the intrusion involved in requiring the States to pay at least minimum wages to state employees "so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States. . . ." Id.

As Professor Alfange aptly observes, under this approach to the Tenth Amendment questions of constitutionality necessarily turn on whether, in the view of the judiciary, "Congress is imposing unnecessary or unjustified requirements on the states," Alfange, supra n.25, at 266-67, just as under Lochner v. New York, 198 U.S. 45 (1905), constitutional questions turned on whether, in the judiciary's view, burdens on individuals were "unnecessary or unjustified." This approach thus is "a vehicle by which the Court, in the guise of constitutional law, can replace policy determinations of Congress concerning interstate commerce with [policy determinations of] its own," Alfange, supra n.25, at 267.28/

28/ See also Kaden, Politics, Money and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 848 (1979), (National League "articulates no principle of sufficient generality to aid lawmakers or lower federal courts in testing federal regulations of state activity"); Cox, Federalism and Individual Rights Under the Burger Court, 73 Nw. L. Rev. 1, 22 (1978) (National League "reveal[s] nothing beyond the Court's willingness to grant the states immunity from federal regulation entailing what five Justices consider an unduly burdensome increase in the cost of state and local government.")

Justice Stevens made the point best in his concurring opinion in EEOC v. Wyoming, supra:

> My conviction that Congress had ample power to enact this statute, as well as the statute at issue in National League of Cities, is unrelated to my views about the merits of either piece of

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H. For all of the foregoing reasons we respectfully submit that the Court should overrule National League and hold that Congress' commerce clause power is not subject to any constitutional limits derived from state sovereignty. Only such a holding would be faithful to the framers' intent. Pp. 3-11, supra. Only such a holding would accord with this Court's jurisprudence for the one hundred and fifty years preceding National League. Pp. 11-18, supra. Only such a holding would resolve the tensions just noted in the doctrine the Court has formulated. And only such a holding would enable the Court to escape the task which, we submit, experience teaches is inherently incapable of judicial resolution: that of reading into the Constitution an "affirmative limitation," 426 U.S. at 841, on the "manner" in which Congress "exercis[es] the authority" granted it by the Commerce Clause," id. at 845.29/

28/ Continued

> legislation. . . . My personal views on such matters are . . . totally irrelevant to the judicial task I am obligated to perform. There is nothing novel about this point -- it has been made repeatedly by more learned and more experienced judges. But it is important to emphasize its obvious limit on the proper exercise of judicial power, one that is sometimes overlooked by those who criticize our work. [103 S. Ct. at 1068]

29/ This is the conclusion urged by Alfange, supra n.25, and Tushnet, supra n.24. Professor Cox reaches essentially the same conclusion, but with one caveat: "Judicial second-guessing of nondiscriminatory regulation is not necessary in order to protect the existence and effective functioning of the states against destruction at the hands of the national government." Cox, supra n.28, at 25 (emphasis added). And thirty years ago, Professor Wechsler reached a similar conclusion: "Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands." Wechsler, supra n.9, 559.

II. EVEN IF NATIONAL LEAGUE WERE CORRECT IN HOLDING THAT STATE SOVEREIGNTY PLACES A LIMIT ON THE COMMERCE CLAUSE POWER, THE EXTENT OF THE LIMIT ESTABLISHED BY NATIONAL LEAGUE SHOULD BE RECONSIDERED.

Even if, contrary to what we have just shown, the Court were to conclude that National League is sound in recognizing a state-sovereignty limit on the commerce power, we respectfully suggest that the extent of the limitation established by that case should be reconsidered. For as we now show, in all events it is clear that the Court in National League erred (A) by equating state sovereignty with the State's provision of goods and services, and (B) by equating the States with their political subdivisions.

A. The Provision of Goods and Services Is Not an Essential Part of State Sovereignty.

1. In National League the Court, after concluding that considerations of state sovereignty limit the commerce power, stated that "[t]he question we must resolve" is whether determining the wages and hours of work by state employees "are '"functions essential to separate and independent existence,"' so that Congress may not abrogate the States' otherwise plenary authority to make them." 426 U.S. at 845-46 (citation omitted). The Court answered that question as follows:

> [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." This exercise

> of congressional authority does not comport with the federal system of government embodied in the Constitution. [426 U.S. at 852]

And Maryland v. Wirtz was overruled because the National League Court "agree[d] that such assertions of [federal] power [as were entailed in the application of the FLSA to the States] would indeed, as Mr. Justice Douglas cautioned in his dissent in Wirtz, allow 'the National Government [to] devour the essentials of state sovereignty.'" 426 U.S. at 855.

The stated rule of National League thus is that Congress may not threaten the States' "separate and independent existence," "impair the States' 'ability to function effectively in a federal system,'" or "devour the essentials of state sovereignty."[30/] But that rule does not in itself require that application of the FLSA to some or all state employees providing goods and services is invalid; it is not intuitively obvious that requiring the States to abide by the labor protections for such employees stated in the FLSA would, for example, "devour the essentials of state sovereignty," let alone jeopardize the "separate and independent existence" of the States. That conclusion follows only if it is agreed that provision of goods and services is an essential of state sovereignty.

The Court in National League was not prepared to go quite that far. To rationalize its holding with the Court's prece-

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30/ Subsequent cases have reaffirmed that this is the intended scope of the limit on Congress' power. See, e.g., Transportation Union v. Long Island R. Co., supra, 455 U.S. at 686 (Congress may not "hamper the State government's ability to fulfill its role in the Union"); EEOC v. Wyoming, supra, 103 S. Ct. at 1060.

dents permitting federal regulation of state-owned ra
see p. 16, supra (including federal regulation of the
labor-management relations of such railroads) -- and, mor
to assure that States' immunity from federal regulation wo
not be ever-expanding as the States assumed new functions --
the National League Court limited its conception of state sover-
eignty to the provision of only "traditional," 426 U.S. at 851,
or "integral," id. at 854 n.18, services, and permitted federal
regulation of the employment conditions of state employees
engaged in the performance of other state functions.31/

As the commentators have observed, this limitation on the reach of National League underscores an anomaly in the doctrine announced in that case:

> [I]t is difficult to understand how a distinction drawn by a federal court between what could be described as nontraditional services (subject to federal control) and traditional services (not subject to federal control) would not itself make a severe inroad into a state's "sovereign perogative of choice.". . . On the other hand, if

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31/ In light of this limitation, it is clear that, despite some dictum in the opinion, National League does not mean that establishing the wages of the employees the State hires is an essential attribute of state sovereignty; rather, under National League, that is true with respect to only certain employees, and it is true about those employees only because they are engaged in functions which the Court determined to be essential to the State and whose performance the Court determined could be disrupted by the application of the FLSA.

Even as to those services with respect to which National League recognized a state immunity from federal regulation, the Court in National League was not prepared to hold that immunity to be absolute; thus the Court based its holding, in part, upon the degree of intrusion that it believed application of the FLSA would cause. As previously noted, the limitation on National League to especially intrusive federal laws is itself problematic. See pp. 34-35, supra.

> "traditional" is redefined to mean "important" or "essential" the concept becomes boundless.[32/]

Precisely because this is so the debate in this case comes to whether state-operated buses and subways are constitutionally distinguishable from state-operated commuter trains.

These difficulties suggest that even if the Court were to continue to limit Congress' commerce clause power so as to protect state sovereignty, there would be a need to reconsider the question of to what extent, if at all, the States must be permitted to provide goods and services free and clear of federal commerce clause regulation in order to be "ab[le] to function effectively in a federal system."

2. In addressing that question it is important to bear in mind, at the threshold, that the concept of "state sovereignty" is not self-defining. The word "sovereignty" ordinarily connotes a single, supreme government -- a nation-state. Within the unique federal system that the framers created, however, state sovereignty cannot have that meaning, for within that system there is a national government which is preeminently the sovereign and whose laws are the "supreme law of the land."[33/] Thus the term "state sovereignty" must be

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32/ Alfange, supra n.25, at 233-34. See also L. Tribe, supra n.25, at 311; Kaden, supra n.28, at 887; Tushnet, supra n.24, at 1339; La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash. U.L.Q. 779, 958 (1982).

33/ For precisely that reason, a number of delegates at the constitutional convention urged that it was misleading even to speak of the States as sovereigns. For example, Rufus King of Massachusetts argued as follows:

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defined ab initio with specific reference to the unique federal system created by the Constitution. As the Court stated in EEOC v. Wyoming:

> The principle of immunity articulated in National League of Cities is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a "separate and independent existence" not be lost through undue federal interference in certain core state functions. [103 S. Ct. at 1060]

One of the "unique benefits of [this] federal system" is the existence of a supreme power in the federal government to insure a free flow of commerce, "to enact 'all appropriate legislation' for 'its protection and advancement' (The Daniel

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33/ Continued

> The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign. They had not even the organs or faculties of defense or offense, for they could not of themselves raise troops, or equip vessels, for war. [I Records of the Federal Convention, supra, n.2, at 323]

Madison himself likewise argued:

> Some contend that states are sovereign, when in fact they are only political societies. There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The states never possessed the essential rights of sovereignty. These were always vested in Congress. . . . The states, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation. [I Id. at 471]

Ball, 10 Wall. 557, 564); [and] to adopt measures 'to promote its growth and insure its safety' (Mobile County v. Kimball, 102 U.S. 691, 696, 697) . . . ." Labor Board v. Jones & Laughlin Steel Corp., supra, 301 U.S. at 36-37. Indeed, "the need for centralized commercial regulation was universally recognized as the primary reason for preparing a new constitution." Stern, That Commerce Which Concerns More States Than One, 47 Harv. L. Rev. 1335, 1340-41 (1934). See also p. 24, supra. Whatever meaning is given to the concept of "state sovereignty," therefore, that concept should not be such as to defeat the point of the Commerce Clause.

3. There is no doubt that when the States create goods or services they are engaged in economic activity in the ordinary sense -- activity that can powerfully affect interstate commerce.[34/] The Court at least implicitly acknowledged the point in National League, see 426 U.S. at 840-41, 845, and developed the point at some length in Maryland v. Wirtz, supra, with respect to the state-operated schools and hospitals at issue in that case:

> It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States. For example:
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> In the current fiscal year an estimated $38.3 billion will be spent by State and

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34/ In 1982, for example, over 10% of the gross national product -- $363,400,000,000 -- was accounted for by governments at all levels. Government purchases accounted for over 20% of the GNP -- $649,000,000,000. See 1984 Statistical Abstract of the United States at 449-50.

> local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent 3.9 billion operating public hospitals. . . .[34a/]
>
> For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases.
>
> Similar figures were supplied for other States. [392 U.S. at 194-95]

Defining state sovereignty to include such economic activities -- and thereby denying Congress the power to adopt such regulations as the national legislature deems necessary to protect the flow of commerce -- thus jeopardizes, rather than furthers, one of the "unique benefits of our federal system."[35/]

While we do not believe it either wise or necessary to categorize the mischief that will ensue from hobbling Congress' power to regulate commerce by denying what commerce is -- a cunningly interrelated complex constantly in the process of change -- we do pause to repeat one point noted in our brief

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34a/ For the year 1981, the comparable figure for hospitals was $17.6 billion; for 1983, the comparable figures for schools, was $135.9 billion; 1984 Statistical Abstract of the United States at 113,139.

35/ As the discussion in text indicates, our argument here is limited to situations like that posed by the FLSA, in which Congress regultes the States in common with other entities engaged in the same activity. As Professor Cox observes, "[r]egulation aimed only at state activities would present a quite different question." Cox, supra n.28, at 25. See also n.22, supra (dicussing Justice Frankfurter's opinion in New York v. United States).

last Term. If the States as providers of goods and services were immune from federal regulatory authority, the Tenth Amendment would create a powerful incentive for transferring business enterprises from private to public ownership. Federal regulation, in the interest of other social objectives, often imposes costs on the operation of a private good or service producing entity, as the instant case and National League both illustrate. If those costs could be avoided merely by state acquisition of a business, it would become economically advantageous for the States to acquire and operate business enterprises free of the federally-imposed costs. Yet plainly the Tenth Amendment was not intended to encourage a state take-over from the private sector of the provision of goods and services.

4. There is another, equally fundamental reason for concluding that, in general, state provision of goods and services is not one of "the essentials of state sovereignty." In contrast to the making and enforcement of laws -- which is the exclusive province of government (and the "quintessential attribute of sovereignty," FERC v. Mississippi, supra, 456 U.S. at 701) -- when providing a good or service a State does act, contrary to the assertion in National League, 426 U.S. at 849, like the other "factor[s] in the 'shifting economic arrangements'" for providing that good or service. States run schools, hospitals, parks and the like, but so do private for profit and not-for-profit entities .[36/] From the perspective

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36/ For an elaborate demonstration of this point, see the brief appellee San Antonio Metropolitan Transit Authority filed

Continued

of the employees engaged in delivering these services; the manufacturers, sellers and transporters of goods used in creating the services; and the ultimate consumers of the service, the service is very much the same whether supplied privately or publicly. The practice of medicine in public and private hospitals is the same, the suppliers of both institutions are the same, and both draw on the same corps of trained medical personnel. The parallels between public and private educational institutions are equally close -- indeed these are the common source of the trained personnel employed by public and private hospitals. In sum, in Justice Frankfurter's phrase, the provision of services thus does not "partake of uniqueness from the point of view of intragovernmental relations." New York v. United States, supra, 326 U.S. at 582.

Furthermore, no law of nature, no political principle, and no rule of economics determines which goods and services will be produced by the State and which will not. The range of options is wide; it includes: leaving production to private enterprises; regulating the private sectors' production of the good or service; providing financial assistance to would-be-purchasers of the good or service (this assistance may be limited by a means-test or may be in the form of vouchers distributed to all individuals); licensing one or more private entities to create the good or service; subsidizing production of the good

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36/ Continued

in this case last Term, pp. 35-38. See also Brief of American Public Transit Association, at 25 n.33.

or service by private entities; or providing the good or service through government employees.37/

There is no theory -- certainly none enshrined in the Constitution -- that explains why, in our society, governments generally have chosen not to be involved in, e.g., the production and distribution of what are undoubtedly two of the most important goods of all, food and clothing, but frequently have chosen to run, e.g., golf courses and zoos. Moreover, as to many services, different governments, at different times, have made different choices: services that in some localities are provided by the government itself in other localities are provided by a private entity pursuant to a contract or by private entities operating in a competitive market. And even in a single locality different options may be tried and retried over time.38/

The example of refuse collection, perhaps the most mundane of National League's "traditional" functions, see 426 U.S. at 851, serves to illustrate our point. The manner in which this service is delivered varies greatly from place to place. In some cities, the government itself provides the service. In

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37/ See, e.g., E. Savas, Privatizing the Public Sector at 55-75; H. Hatry, A Review of Private Approaches for Delivery of Public Services (1983).

38/ See sources cited n.37, supra. In this regard it is noteworthy that recently it has become increasingly common for governments to contract with a private entity to provide a particular service to the government's citizens rather than for the government to provide that service itself. See AFSCME, Passing the Bucks: The Contracting out of Public Services at 10-11 (1983).

other cities, the government contracts with a private firm to do the work at government expense. On the West Coast, it is common for the city to award a territorially exclusive franchise to a private firm which bills the households it serves for its service. And in a number of communities, the free market is relied upon to provide this service on a competitive basis. Indeed, of the various options outlined above "only the voucher system is not utilized to provide [refuse] service in the United States."39/

Given the range of choices for providing goods and services recognized in this society it simply cannot be said as a general matter that providing goods and services is an "essential" of state sovereignty. The fact that, as to any given good or service, some entities that are not sovereign provide the service while some entities that are sovereign do not demonstrates that such activity is not an essential attribute of state sovereignty. Without doubt, a State that provided no services whatsoever would still be a State. So long as the State's authority and discretion to make and enforce laws (within the realm open to it under the Constitution) is not hindered, the State's sovereignty is secure and its "ability to function as a State" and "to fulfill its role in the Union" (p. 38, supra), is not impaired.

For all of these reasons we submit that, at the least, the Court should limit National League so that it restricts Congress' commerce clause power only as necessary to protect

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39/ E. Savas, supra n.37, at 71-72. Surveys have indicated that upwards of 30% of cities contract out for solid waste collection. AFSCME, supra n.38, at 10.

that which FERC v. Mississippi teaches is the "quintessen[ce]" of state sovereignty: the making and enforcement of laws.

B. Federal Regulation of Political Subdivisions Does Not Infringe State Sovereignty.

In National League, the Court invalidated the FLSA insofar as it applied not only to State employees engaged in "traditional" or "integral" functions, but also insofar as it applied to employees of cities, counties, and other political subdivisions engaged in such functions. The sole basis for this ruling was set forth in a footnote:

> As the demonination "political subdivision" implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself. [426 U.S. at 855-856, n.20]

The foregoing is fundamentally unsound. Its falacy is perhaps best revealed by Community Communications Co. v. Boulder, 455 U.S. 40 (1982), in which the Court rejected a city's argument that its "cable television moratorium ordinance is an 'act of government' performed by the city acting as the State in local matters, which meets the 'state action' criterion of Parker [v. Brown, 317 U.S. 341 (1943)]." 455 U.S. at 53; emphasis in original. The Court concluded that this argument

> both misstates the letter of the law and misunderstands its spirit. The Parker state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a

"dual system of government," Parker, 317 U.S. at 351 (emphasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with

> the Government of the United States, or [with] the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in subordination to one or the other of these." United States v. Kagama, 118 U.S. 375, 379 (1886) (emphasis added).

The dissent in the Court of Appeals correctly discerned this limitation upon the federalism principle: "We are a nation not of 'city-states' but of States." [455 U.S. at 53-54]

This same understanding is reflected in this Court's decisions interpreting the Eleventh Amendment. That Amendment, to a greater extent than the Tenth Amendment,[40/] "embodies" the "principle of state sovereignty," Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), for "immunity from suit is a high attribute of sovereignty," Hopkins v. Clemson Agricultrual College, 221 U.S. 636, 642 (1911). Yet the Court has never concluded that state sovereignty considerations require that the immunity established by that Amendment extend to political subdivisions; to the contrary, "the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities . . . ." Lake Country Estates v. Tahoe Planning Agcy., 440 U.S. 391, 401

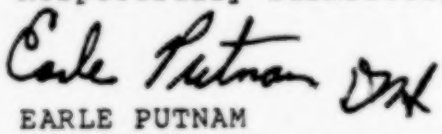
40/ The Eleventh Amendment is a quite explicit restriction on the power of the federal government (specifically the power of Congress under Article III to vest certain jurisdiction in the federal courts) whereas the Tenth Amendment limits federal power, if at all, only by implication.

(1979) (emphasis added); Mt. Healthy Board of Ed. v. Doyle, 429 U.S. 274 (1977); Old Colony Trust Co. v. Seattle, 271 U.S. 426 (1926); Lincoln County v. Luning, 133 U.S. 529, 530 (1890).[41/] And it is entirely impermissible to treat the Tenth Amendment as giving the word "State" a broader meaning than that word has in the Eleventh, or to hold that political subdivisions share in the States' "sovereignty" for Tenth Amendment purposes although not for the purposes under the Eleventh.

CONCLUSION

For the foregoing reasons, and those statedin our briefs last Term, the judgment of the district court should be reversed.

Respectfully submitted,



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41/ In Lincoln County, the Court refused to extend the Eleventh Amendment's protections beyond States, although on the same day (March 3, 1890), in Hans v. Louisiana, 134 U.S. 1, the Court expanded that Amendment beyond its literal language to foreclose federal jurisdiction over a suit against the State by one of its own citizens.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

Nos. 82-1913 and 82-1951

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,
Appellees.

CERTIFICATE OF SERVICE

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On Appeals from the United States District Court for the Western District of Texas

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SUPPLEMENTAL BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND THE UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

The interest of the *amici* is set forth in their prior brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the question of the extent to which state and local governing power is protected against federal regulation by the Tenth Amendment. The current standard for measuring such protection is the three-pronged test developed under *NLC v. Usery*, 426 U.S. 833 (1976).

The present case was argued to the Court last term. *Amici*, who represent the governors, state legislators, cities and counties of the nation, filed a brief expressing "grave reservations as to whether the three-pronged test provides satisfactory criteria for determining whether state and local power is protected under the Tenth Amendment." *Brief for the National League of Cities, et al.*, at 15. *Amici* said the three-pronged test creates serious intellectual and practical difficulties, and that state and local power almost never survives under it. The consequence, argued *amici*, is ever increasing centralization of power in the national government, with concomitant diminution in state and local power—a result eschewed by principles of federalism. *Id.* at 15-16, n.7. However, *amici* did not further develop their criticisms of the three-pronged test, but instead stated that they would present their views in appropriate future cases. *Ibid.*

On July 5, 1984, the Court set this case for reargument. The Court requested supplemental briefing on the question "[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?" In this brief *amici* are therefore stating their views on

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

appropriate standards for judging state and local immunity under the Tenth Amendment.[2]

In summary, *amici's* position is this: The Framers of the Constitution deliberately established a federal system in which effective governing authority is divided between the national government and the states. This division of power was considered essential to avoid a dangerous centralization of authority in the federal government, and is a vital component of the system of checks and balances. The power of the federal government and of the states must both be respected. Neither can be permitted to impair the other; neither can be extended to the point where it gravely harms the other. Thus, where there is a clash between them, they must be harmonized by means of a balancing process. Under this process the Court must first determine whether a challenged federal law or regulation impairs the ability of states to effectively exercise their governing authority. If it does so, the federal action must fall unless it carries out a federal interest that overrides the state power, and is tailored to further such interest in the manner least harmful to state authority.[3]

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[2] Two of the *amici*, the National League of Cities and the National Governors' Association, were parties in *NLC v. Usery*, and thus have a longstanding interest in judicial application of the Tenth Amendment.

[3] The position urged by *amici* is very close to or identical with that expressed in Justice Blackmun's concurring opinion in *National League of Cities, supra*, and to views expressed by Justice O'Connor, joined by the Chief Justice and Justice Rehnquist, in a concurring and dissenting opinion in *FERC v. Mississippi*, 456 U.S. 742 (1982). Justice Blackmun favored a balancing approach which allowed the exercise of federal authority where there is a strong and demonstrable federal interest that necessitates state compliance. 426 U.S. at 856. Justice O'Connor said that, in determining whether an asserted federal interest justifies state submission, the Court must consider "not only the weight of the asserted federal interest," but also "the necessity of vindicating [it] in a manner that intrudes upon state sovereignty." 456 U.S. at 781, n.7.

ARGUMENT

I. The Constitution Establishes a Federal System in Which the Powers of the National and State Governments Must be Harmonized by Means of a Balancing Process

A. *The Framers Created a Federal System in Which the National and State Governments Each Have Effective Governing Authority*

1. The Framers of the Constitution created a federal system of government. They divided governing power between the national government on the one hand, and states on the other. The national government and the states were each to have effective authority within their spheres.

This concept of federalism is part of the fabric of the Constitution. As stated by the Solicitor General, "the federal principle of division of authority between the national government and the states is imbued in both the constitutional text, which recognizes the states as enduring units of government, and in the overall structure of the national charter." *Supplemental Brief for the Secretary of Labor* (hereinafter "*Supp. Br. Sec.*"), at 3.

The Tenth Amendment, under which this case arises, reflects the federal nature of our system. But it is only one manifestation of the pervasive principle of federalism. This, too, was recognized by the Solicitor General, when he said "[t]he Tenth Amendment is only the most obvious textual manifestation of the federal principle and of the enduring role assigned to the states in our system of government. Others abound." *Supp. Br. Sec.* at 4.

Because the Framers desired a federal system in which the national and state governments would each have effective authority, they expressly delegated certain powers to the national government, while reserving to states a vast realm of authority over the day to day affairs of the body politic. This was explained by James Madison:

> "The powers delegated . . . to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *The Federalist No. 45*, p. 313 (J. Cooke ed.1) [Madison].

Thus, under the Constitution, states have a wide area of governing authority.

2. There were several reasons why the Framers created a federal system in which the states possess extensive authority. Though the Framers believed the national government has to perform functions that individual states could not effectively perform themselves—such as conducting foreign affairs and regulating commerce between the states—they also feared centralized national authority. As colonists they had been subjected to concentrated power, and had grown " 'suspicious of every form of all-powerful central authority.' To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government." *FERC v. Mississippi*, *supra*, 456 U.S. at 790 (O'Connor, J., concurring in part and dissenting in part) (citation omitted).

Related to the Framers' fear of centralized power was their desire to ensure liberty. Division of power between national and state governments was therefore relied upon as an important safeguard of freedom (as was the division of power within the national government itself). These divisions of power, as Justice Powell has stated in regard to the divisions among the three branches of the national government, are part of the "system of checks and balances." They are "far more central to the larger perspective than any single power. . . ." *EEOC v. Wyoming*, —— U.S. ——, ——, 103 S.Ct. 1054, 1076

(1983) (Powell, J., dissenting). Unless the divisions of power are "zealously protected[ed] . . . we risk upsetting the balance of power that buttresses our basic liberties." *FERC v. Mississippi*, *supra*, 456 U.S. at 790 (O'Connor, J., concurring in part and dissenting in part).

The Framers also believed that state governments are closer to the people than the national government. State governments often have a greater understanding of their citizens' needs and, unlike Congress, can tailor laws and regulations to a host of diverse local requirements. This was extensively pointed out by the Chief Justice in *EEOC v. Wyoming*, *supra*, —— U.S. at ——, 103 S.Ct. at 1075 (Burger, C.J., dissenting).

Finally, though the Framers themselves did not explicitly consider the point, history has shown that the governing powers of states enable them to serve as laboratories for devising solutions to pressing problems. Such solutions often are adopted later by other states or the national government. In the seminal words of Justice Brandeis, "it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 331 (1932) (Brandeis, J., dissenting).

B. *The Powers of the National Government Must be Construed in Light of the Powers of the State Governments and Vice Versa*

Because the Constitution establishes a federal system with checks and balances, the powers of the national and state governments cannot be viewed in isolation from each other (just as the powers of the three branches of the national government itself cannot be viewed in isolation from each other). Rather, the powers of the national government must be construed in light of the powers of state governments and vice versa. This is only the more true because the national and state governments some-

times have concurrent power over a subject, *e.g.*, concurrent power exists over aspects of interstate commerce.

Construing the powers of one organ of government in light of the powers of another is an established and necessary mode of constitutional interpretation. It has been adopted in major constitutional cases involving powers of branches of the federal government, such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *New York Times Co. v. United States*, 403 U.S. 713 (1971); and *United States v. Nixon*, 418 U.S. 683 (1974). It has also been adopted in cases involving a clash between state and national powers. In litigation involving the Twenty-first Amendment, for example, the Court has said that "'[b]oth the Twenty-first Amendment and the Commerce Clause are part of the same Constitution [and] each must be considered in light of the other.'" *Bacchus Imports, Ltd. v. Dias*, No. 82-1565 (June 29, 1984), slip op. at 11, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (brackets in original). "The mode of analysis to be employed" must therefore be a "'pragmatic effort to harmonize state and federal powers.'" *Ibid.*

Construing the powers of one organ of government in light of the powers of the other is necessary to preserve the constitutional plan. Absent such construction, the powers of one organ might be construed so broadly as to defeat or even obliterate the powers of another. The possibility of such an encompassing, cannibalistic interpretation of one set of powers was specifically recognized by this Court in regard to the war powers, when the Court said that "if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress, but largely obliterate the Ninth and Tenth Amendments as well." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

What is true of the war power is also true of other federal powers such as the commerce power. Though the interstate commerce clause originally covered only com-

merce which actually moved between the states, and was designed simply to prevent discrimination and remove trade barriers, it now covers any activity which remotely affects interstate commerce. And there is virtually nothing which cannot be said to affect interstate commerce in some way. Thus, if the federal commerce power can *ipso facto* override state authority, and need not be harmonized with state power, then the commerce power will "largely obliterate the Ninth and Tenth Amendments" and the entire concept of federalism as well.

The same all consuming, destructive capacity also inheres in the spending power. This was elaborated in *amici's* prior brief, at pages 29-30. As explained there, centralized national power will be vastly increased, and state and local power will be correspondingly diminished, if a grant of federal funds enables the national government to lay down governing rules in areas the Constitution otherwise commits to state and local governments.

The need to interpret national powers in a manner that does not obliterate state authority has been recognized by this Court. It said in *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975), that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." The necessity of harmonizing state and federal powers was also recognized extensively in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), where the Court eloquently said that the concept of federalism means:

> "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Feder-

alism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

C. *When There is a Clash Between National and State Power, the Court Must Engage in a Balancing Test. Under This Test it Should Determine Whether There is Injury to the States' Ability to Govern, and Whether the Asserted Federal Power is Overriding and is Carried Out in the Least Intrusive Manner*

We have shown that the Framers created a federal system in which the national government and the states each possess governing authority. We have also shown that the powers of the national government must be construed in light of the powers of the states and vice versa. Therefore, when there is a clash between a federal law and state power, the Court must first determine whether the federal action injures the ability of states to govern effectively. If the federal act does so, it must fall unless it carries out a federal interest that overrides the state power, and is tailored to further such interest in the manner least harmful to state authority. In short, the Court must engage in a balancing test of the type it has commonly applied in numerous areas of law.

In *NLC v. Usery*, *supra*, the Court made clear that it had previously adopted such a balancing approach in *Fry v. United States*. The *NLC* Court noted that *Fry* had involved an emergency economic measure necessary to combat an "extremely serious problem which endangered. . . all the component parts of our federal system." 426 U.S. at 853. Only action by the national government could forestall the danger. The federal government's action was merely temporary, and did not "interfere with the States' freedom of action beyond a very limited, specific period of time." It displaced no state choices, and reduced rather than increased the pressure upon state budgets. *Ibid.*

Thus, the *Fry* Court engaged in the very type of balancing process espoused by *amici*: it considered whether

a federal law interfered with state governing authority, whether the law was necessary to accomplish an overriding federal purpose, and whether it furthered that purpose in the least intrusive way.

In considering whether a given federal action is constitutional though it clashes with the governing authority of states, the Court must necessarily take account of the powers involved and the actual facts of the case. As the Court recently said in resolving a clash between the Twenty-first Amendment and the Commerce Clause, it must consider rival powers in "the context of the issues and interests at stake in any concrete case." *Bacchus Imports Ltd. v. Dias*, *supra*, slip op. at 11. Thus, where the national government invokes a power central to its creation, and does so to accomplish purposes also central to its creation, its chances of success will be greater than where it invokes a lesser power or purpose. For example, where the national government invokes the interstate commerce clause to prohibit state discrimination against such commerce or state rivalries which gravely burden the commerce, the federal chance of success will be higher than in cases where it invokes a less central power or invokes the commerce power to regulate some activity which has only a small or remote effect on commerce. Similarly, if the federal government invokes the commerce power to cure a national problem requiring a uniform solution, or to solve a widespread health or economic problem which states cannot address effectively because economic necessity makes them rivals in seeking to attract the industries which cause the problem, then the national government's chance of success will be greater than in cases where it invokes the commerce power though states can and are providing effective answers to problems which are susceptible to local solutions.[4]

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[4] Two cases which were decided after and are progeny of *NLC v. Usery* exemplify situations in which the federal commerce power was invoked to solve crucial national problems which the states themselves had not been able to and probably could not solve. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), the national government addressed serious

Yet, though the national government's chance of success will be greater where it invokes a power central to its creation and does so to accomplish a purpose that is also central to its creation, even here a national power cannot be carried to the point of gravely impairing state authority. The national government could not, for example, limit the number of state employees because it believes they would be more productive in tasks other than those assigned them by states. For the power to determine the tasks of their employees, and the number of workers who shall perform them, is a central feature of states' ability to govern, and is therefore a power which the national government cannot override.

Just as national powers are limited by state powers with which they clash, so too the reverse: state authority is limited by national powers with which it clashes. For example, under the Fourteenth and Fifteenth Amendments, the prevention of discrimination is an overriding national purpose which can be and is carried out by federal legislation. No state possesses the constitutional authority to disregard such legislation. Similarly, there are environmental and energy problems which pose a grave threat to interstate commerce and cannot be solved by states. In such instances, state governing power can be overridden by an exercise of the federal commerce power designed to cure a threat to the national economy.[5]

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environmental problems that eluded state solution. And in *FERC v. Mississippi*, *supra*, the federal government dealt with a national energy crisis that was beyond the capacity of states to overcome. The facts of those cases thus exemplify the need for the type of balancing approach advocated here by *amici* and adopted in *NLC* by Justice Blackmun (426 U.S. at 856), who would allow the exercise of federal authority where there is a demonstrably great national interest.

[5] We note that there are cases in which the federal power to act is for practical purposes indisputable under the balancing test, *e.g.*, a situation in which the national government invokes the war power to stabilize the national economy during a military crisis.

Even in cases involving a clearly applicable national power, the federal government's challenged action must actually further the

D. *The Supremacy Clause, Which Ensures that Constitutional Principles Will Prevail, Cannot be Used to Vitiate Federalism*

Appellant Garcia seeks to evade the need to harmonize federal and state powers. He would resolve in favor of national authority all clashes of power between the national government and the states. Thus, he asserts that the Supremacy Clause removes all restraints upon Congress stemming from the sovereign authority of states. According to his argument the clause establishes unrestricted federal hegemony. He seeks to bolster his argument for uncabined federal power with quotes from the Framers and this Court which purportedly support such an interpretation. *Brief of Appellant Joe G. Garcia on Reargument* (hereinafter "*Garcia Rearg.*") at 4-11.

Garcia's position is untenable. Under the Supremacy Clause the Constitution is the supreme law of the land. Principles of federalism are pervasively embedded in that supreme law. A position which vitiates federalism is thus inconsistent with the Constitution and cannot be maintained. Garcia's position does vitiate federalism by removing all restraints on Congress' power vis-a-vis the states. Thus, his view cannot stand.

Nor is Garcia's position saved by broad statements he cites. Understood in context those statements were designed to *establish* federalism, not to *destroy* it. When the country began and for scores of years thereafter (indeed until the "constitutional revolution" of the late 1930's and early 1940's), the great question was whether the national government would be too weak to achieve the purposes for which it was created or would instead have powers adequate to that end. It was feared that

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federal interest being asserted. The national government's means must be adapted to the substantive end. Moreover, the need for federal action that overrides state power should not be a hypothetically rational construct advanced after the fact by government counsel. Rather, it should be a matter that was considered by Congress itself. Otherwise, the necessary protection received by states under the balancing test could be lessened.

the goal of effective national authority would be thwarted by the vast state powers existing before the Constitution and by the historical fact that, as Madison put it, "the first and most natural attachment of the people will be to the governments of their respective states." *The Federalist No. 45*, *supra*, at 316 [Madison]. Thus, to establish a federal system in which the national government too possessed effective authority, the Framers and this Court often pointed out that the will of Congress would prevail where the federal government had constitutional power. These statements were intended to help ensure the national government would not be weak and helpless because of state power. But statements made to establish federalism by strengthening the national government in the face of powerful states, were not intended to destroy federalism by enabling a central government which has grown huge and powerful to override the proper exercise of authority by now weakened states.[6]

II. The Constitutionally Protected Authority of States Encompasses the Powers Necessary to Govern and Serve Citizens, and the Protection Enjoyed by States Under the Tenth Amendment Extends to Cities and Counties

A. *State Powers Are Not a Closed Catalogue. They Are Broad and Change Over Time as Necessitated by New Economic, Technological and Demographic Facts*

1. Because states have authority which cannot be impaired by the national government, the question arises of precisely which governing powers the states possess. The answer is that there is no closed catalogue of state

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[6] The potential of Garcia's argument to destroy federalism is enhanced because it need not be confined to the commerce clause. (Garcia, indeed, suggests no reason why it should be so confined.) Rather, it extends to any clause granting power to the federal government. Thus no national power would be restricted by principles of federalism, and state power would be diminished accordingly.

powers. Rather, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state." *The Federalist No. 45*, *supra*, at 313 [Madison]. In short, the authority of states encompasses all powers necessary to govern their citizens and serve the public welfare.

Just as state powers are not a closed catalogue, so too they are not static. Rather, they grow and change over time, as necessitated by new economic, technological, and demographic facts. Thus, over time, states and local governments have often begun to provide new services needed by citizens: such services have included public schools, hospitals, fire departments, sanitation facilities, airports and, as in this case, mass transit.

The need for growth and change in state powers is no less today than in former years. For today the states and their subdivisions, the cities and counties, are confronted with a host of nearly intractable problems relating to slums, traffic, schools, noise and air pollution, jobs, welfare and other matters. The states and their subdivisions must therefore possess the authority needed to develop constructive solutions to such overriding contemporary problems.

That the powers of states must and do grow and change as necessitated by the public welfare has long been recognized by leading constitutional scholars. Thus, in his *Constitutional Government in the United States* (1908), Woodrow Wilson said:

> The question of the relation of the States to the federal government . . . cannot . . . be settled by the opinion of any one generation, because it is a question of growth, and every successive state of our political and economic development gives it a new aspect, makes it a new question . . . Our activities change alike their scope and their character with every generation.

And in a similar vein, Justice Black said:

> Many governmental functions of today have at some time in the past been non-governmental. . . . [*T*]*he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires. Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) (emphasis added).

Finally, we note that the necessity for change and growth in state powers is not generically different from the growth which had to occur in federal power from approximately 1880 through 1940. During that period there were constant efforts—often struck down by the judiciary—to expand the federal commerce power so as to solve pressing national economic problems. These efforts received acceptance by this Court at the end of the 1930's and the beginning of the 1940's. The necessary change and growth in the federal commerce power finds a counterpart in changes and growth in state power when this is necessary to enable states and their subdivisions to meet problems which beset the public welfare. Indeed, were federal but not state power to be capable of growth to meet economic and social exigencies, then national authority would continuously expand relative to that of states. The concept of federalism would ultimately become archaic and meaningless.

2. Appellant Garcia seeks to foreclose the necessary growth in state authority. He therefore asserts that a state acts in a sovereign capacity only when it makes and enforces laws, and not when it provides goods and services. Thus, he argues, federal laws necessarily are applicable to the provision of goods and services by states.

Garcia's position is contrary to historical facts and to this Court's jurisprudence. It has always been the function of government to provide services which are best supplied by the public sector. Indeed, the provision of important services is one of the basic reasons for institut-

ing government in the first place. Thus, governments all over the world have provided police protection, military defense, postal services, schools, judicial tribunals, hospitals and other necessities of life.

The services government must provide have naturally grown over time as conditions change, and have come to include many functions which previously were supplied by private parties or which are still supplied in part by such parties. Governments have undertaken such services because private businesses could not or were not serving the needs of citizens on a sufficiently widespread basis or at a sufficiently affordable price. Schools and hospitals are longstanding examples. More recently, numerous additional illustrations have arisen because of the necessities of modern life. Thus, governments around the globe, including the national and state governments in this country, now provide energy, airports, long distance transportation, and local mass transit.

This Court itself has said that supplying services is a fundamental function of state governments, and that such governments are engaged in a sovereign function when they perform the services. Thus in *NLC*, *supra*, the Court said that fire prevention, police protection, sanitation, public health, and parks and recreation are activities "typical of those performed by state and local governments in discharging *their dual functions of administering the law and furnishing public services.*" 426 U.S. at 851 (emphasis supplied). "Indeed", continued the Court, "it is functions such as these which *governments are created to provide*, services such as these which the States have traditionally afforded their citizens." *Ibid.* Furthermore, "the essentials of *state sovereignty*" would be "devour[ed] if the federal government could force upon States its choices of how to operate such activities as schools, hospitals, fire departments and police departments." 426 U.S. at 855.[7]

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[7] That government acts in a sovereign capacity when it provides services needed by citizens is a proposition which is not diminished

B. *The State's Tenth Amendment Immunity Extends to Cities and Counties*

In order to carry out powers they possess under the Constitution, states create cities and counties, which are political subdivisions of the states. Cities and counties represent a state's chosen method of organizing itself for the purpose of carrying out state policy and governing effectively. They "are instrumentalities of the State." *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883). They "derive their authority and power from their respective states," *NLC*, *supra*, 426 U.S. at 855, n. 20, and simply carry out the states' own powers. Thus, "[t]he actions of local government *are* the actions of the state," *Avery v. Midland County, Texas*, 390 U.S. 474, 480 (1968) (emphasis in original), and cities and counties receive the same immunity as the state itself under the Tenth Amendment. As this Court held in *NLC*, *supra*, 426 U.S. at 855, n. 20, the actions of cities and counties are "beyond the reach of Congressional power under the Commerce Clause just as if such services were provided by the State itself."

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by a "scare argument" employed by Garcia. Such argument is that private businesses will be taken over by states if the latter receive Tenth Amendment protection from federal regulation and its attendant costs when supplying goods and services. *Garcia Rearg.* at 40-41.

However, states and local governments do not become involved in previously private businesses, with all their many attendant problems, because federal regulation will thereby become inapplicable. Rather, as indicated above, if state and local entities become involved in formerly private activities, it is because appropriately elected and appointed public officials have determined that private businesses cannot or are not serving the needs of citizens on a sufficiently widespread basis or at a sufficiently affordable cost. This is the history and the reality whether one looks at schools, hospitals, mass transit or other functions. Nor is appellant Garcia able to cite even a single concrete example in which a state or local government became involved in the travails of owning and running a private business in order to oust federal regulation. His argument is merely an intellectual chimera.

The correctness of these principles is emphasized by the fact that the cities and counties often bear the brunt of serious problems besetting the state. They thus need the same latitude to solve the problems as is possessed by the states. For it is cities and counties which massively confront modern problems relating to schools, traffic, slums, welfare, and other matters.

Appellant Garcia argues that cities and counties cannot receive protection under the Tenth Amendment because they are not treated as states under the Eleventh Amendment. But cities and counties *are* treated as states under the Fourteenth Amendment, the Fifteenth Amendment, the obligation of contracts clause, and the just compensation clause. *E.g., Avery v. Midland County, supra; Trenton v. New Jersey*, 262 U.S. 182 (1923). Plainly, their treatment under the Eleventh Amendment does not determine their treatment under other constitutional clauses. Rather, the policies underlying each clause must be and are considered separately. The policies underlying the Tenth Amendment necessitate that cities and counties be treated as states for purposes of that clause because, as said above, they carry out the state's own power, are the state's chosen method of organizing itself, and face the same serious problems that confront the states themselves.[8]

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[8] It is questionable whether there is even any Eleventh Amendment policy which justifies giving cities and counties less immunity under that amendment than is enjoyed by states. In an 1890 case the Court said that cities and counties do not share the states' immunity because they are corporations chartered by the states. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). But counties are *not* corporations, and, with but few exceptions, they do not even have charters. Rather, counties are direct instruments of state sovereignty created by state constitutions or statutes. They have executive and legislative arms, and are subject to the electorate. And while cities are incorporated, they are not like private corporations. Rather, they are governing bodies with governing arms and powers, and they face all the problems of their parent governing bodies, the states.

In a 1926 case the court said cities do not share states' immunity because they are mere "agents" of the state. *Old Colony Trust Co.*

Finally, Garcia relies on the fact that the standards governing the immunity of local governments under the Sherman Act are different from those governing the immunity of states. While several *amici* disagree with decisions treating cities and counties differently than states under the antitrust laws, those decisions nonetheless do not aid Garcia. For under such decisions the cities and counties share the immunity of states so long as the local governments act within authority granted them by states and carry out state policies. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 416-417 (1978). Similarly, *amici's* argument in this case is that cities and counties share the Tenth Amendment immunity of states precisely because the local governments derive their governing authority from the states and carry out state purposes. Thus, as this Court has correctly noted, there is no conflict between decisions under the antitrust laws and decisions protecting cities and countries under the Tenth Amendment. *City of Lafayette, supra*, 435 U.S. at 412, n. 42.

III. In Accordance With Its Historic Role as Arbiter of the Federal System, This Court Must Determine, Under the Tenth Amendment, the Boundaries of Power Between State and National Governments

A. As shown above, the Tenth Amendment embodies principles of federalism and state authority which are basic to the nation. Appellants Donovan and Garcia, however, urge that this Court should refrain from judicially enforcing the Amendment. Donovan's supplemental brief concedes this Court has ruled against the notion that "enforcement of federalism restraints . . . is extrajudicial in nature", but goes on to urge that, instead of enforcing the amendment, the Court should defer wholesale to Congress. *Supp. Br. Sec.* at 14. Garcia's

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v. Seattle, 271 U.S. 426 (1926). But cities and counties are not agents in the sense that an individual is an agent for a corporation or a government. Rather, as stated above, they are governing political instrumentalities with appropriate governing arms, and they share state powers and problems. They also make independent decisions on behalf of their electorate, to which they are responsible.

brief asserts that the courts should leave questions of state power "to the usual processes of political action." *Garcia Rearg.* at 29.

In urging the Court to abstain from enforcing principles of federalism, Donovan and Garcia both assert that Congress and the political processes should be relied upon to protect the states. They also seek to bolster their argument by claiming that judicial standards cannot be derived in the area of federalism.

The argument made by appellants is contrary to the constitutional scheme, contrary to the tenets of this Court's jurisprudence, and contrary to facts.

Questions of federalism—*i.e.*, Tenth Amendment questions—involve the boundaries of power between the national government and the states. In this respect they are precisely like questions of the location of power among the three branches of the national government itself. In both situations the issue is which powers accrue to which organs of government.

It has historically been the role of this Court to determine such questions—to be the arbiter of the federal system. This role has existed at least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where, in his masterful discussion of the relative powers of Congress and the courts, John Marshall said "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. The Court's role as umpire of the system has been reaffirmed and reapplied throughout American history in many cases of titanic importance to the nation. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*; *Baker v. Carr*, 369 U.S. 186 (1962); *United States v. Nixon*, *supra*. It has been reaffirmed in the face of vigorous claims that the Court should leave to one of the political branches the question of that branch's own power. *United States v. Nixon*, *supra*; *Powell v. McCormack*, 395 U.S. 486, 549 (1969).[9]

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[9] It is true that the Court has deferred to Congress and state legislatures when one or the other has enacted a law regulating

Thus, from the beginning of the nation to our own day the Court has maintained its constitutional role as umpire of the system. It thereby makes a fundamental contribution to the system of checks and balances. This system significantly depends on decisions of power being made not by political officials whose authority is involved and who naturally seek to augment their own role, but by judges who receive life tenure so that they may be insulated from political considerations and may concentrate instead on constitutional ones.[10]

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economic matters and there is no actual clash between state and federal laws. In such cases the Court has applied a presumption of constitutionality. But those cases are far different from ones in which state and federal laws do clash, and the question is whether the state is protected under the Tenth Amendment. For the latter cases involve issues of the boundaries of power between organs of government, which it is the Court's historical duty to determine, and no presumption of constitutionality can be applied because the state and federal laws would *each* be entitled to such presumption if it were utilized.

[10] Appellants seek to elide the Court's constitutional role by claiming that states will receive necessary protection in Congress because the latter "must be presumed to be sensitive to the prerogatives" of state governments. The assertion is highly questionable. For the factors which historically were thought to ensure Congressional sensitivity to states have dramatically changed, and new factors militating against such sensitivity have arisen. *See* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Col. L. Rev. 847, 860-868 (1979). As Justice Jackson eloquently said in discussing modern presidential powers: "it is relevant to note the gap that exists between . . . paper powers and . . . real powers . . . . Subtle shifts take place in the centers of real power that do not show on the face of the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 653 (Jackson, J., concurring).

Thus, it was long thought that Congress was particularly responsive to state governments because Senators and Representatives are elected from the states. Indeed, until the passage of the Seventeenth Amendment, Senators were elected by state legislatures. But Senators are no longer elected by state legislatures, and other factors which gravely lessen sensitivity to state interests have assumed overwhelming importance. Today, huge amounts of money are needed for campaigns; therefore, rather than being tied to

B. Because the Court's historic role is to be the umpire of the system, and an effective system of checks and balances requires that decisions on the boundaries of power not be made by the political officials whose own authority is at issue, it is untenable for appellants to assert that Congress itself should be allowed to determine whether it can override the authority of the states. Such assertion contravenes fundamental principles. It also opens the door to major intrusions on state power as well as to small intrusions that " 'nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.' " *FERC v. Mississippi*, *supra*, 456 U.S. at 774-775 (Powell, J., concurring and dissenting) (citation omitted).

Appellant's position is not rescued by the Solicitor General's contention that adjudication of Tenth Amendment questions may sometimes require consideration of complex facts bearing on governmental processes. In determining the boundaries of power, this Court has often had to take account of such facts; sometimes, indeed, the facts were alleged to threaten catastrophe to the nation. *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*. The existence of complex facts did not cause the Court to shrink from its duty of adjudication, however.

Moreover, the majority and dissenting members of the Court have considered complex facts in Tenth Amendment cases no less than in other cases. See *FERC v. Mississippi*, *supra*; *EEOC v. Wyoming*, *supra*. And, as

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state interests, Senators and Representatives must secure funds from and espouse the causes of political action committees and special interest groups. Access to media has become a major factor in securing election, and enables candidates to bypass state political organizations. Candidates who have built national reputations move to and are elected from states with which they have little historic tie. The power of state political parties over national representatives has greatly declined. Thus, the assertion that the Court should refrain from upholding federalism because Congress will protect the states is not only inconsistent with longstanding constitutional history and jurisprudence, but has become very questionable on the facts.

recognized in both *NLC* and *EEOC*, there will be times when the effects of salient facts will be obvious. *NLC v. Usery*, *supra*, 426 U.S. at 846; *EEOC v. Wyoming*, *supra*, —— U.S. at ——-, 103 S.Ct. at 1063.

C. Appellants are also incorrect in asserting that judicial standards cannot be derived in the area of federalism. As said earlier, in protecting vital principles of federalism under the Tenth Amendment, the Court should employ the same type of test used in other areas of constitutional law, and used in the *Bacchus* case, *supra*, as recently as June 1984 in determining whether state or federal power shall prevail. That is, the Court should harmonize state and federal power by means of a balancing test under which it considers whether state governing authority is being impaired, whether the national government's law furthers an overriding federal interest, and whether the law is tailored to achieve the federal interest with the least harm to state authority.

IV. Under the Balancing Test the FLSA Cannot Be Applied to Publicly Owned Mass Transit Systems

Under the balancing test propounded by *amici*, publicly owned mass transit systems are protected by the Tenth Amendment against application of the Fair Labor Standards Act (FLSA). For when applied to publicly owned mass transit, the FLSA impairs vital governing interests of state and local jurisdictions, furthers no overriding federal interest, and is not tailored to accomplish a federal interest in the manner least harmful to state and local power. This is made clear by matters stated at length in *amici's* initial brief (hereinafter cited as "*Prior Brief*"). Because of limitations of space, such matters shall only be recapitulated in a cursory way here. For a fuller exposition of them *amici* respectfully refer the Court to the earlier brief.

A. To begin with, publicly owned mass transit is a vital governing function of local jurisdictions. It serves critical needs of tens of millions of their citizens, especially minorities, the poor, the elderly, and the handicapped. *Prior Brief* at 3. It is also critical to business

development in urban areas, and to avoid further pollution and traffic congestion. *Id.* at 2, 3.

Thus, publicly owned mass transit systems are one of the vital infrastructure services of urban areas. *Prior Brief* at 4, 18-19, 20-21. Local governments have historically provided a host of important infrastructure services, *id.* at 18-19, 20-21, and long were directly involved with transportation infrastructure services in two different ways. "'[F]rom time immemorial'" local governments built and maintained roads, *id.* at 20, quoting *Molina Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir. 1982), and for many decades they extensively regulated privately owned transit systems. *Id.* at 4-5.

Ultimately, citizens' vital need for mass transit services made it necessary for local governments to go beyond regulation of transit, and to own mass transit systems instead. For transit systems long ago became unprofitable for private companies, which began to go out of business in droves. *Prior Brief* at 5. This spelled disaster for tens of millions of citizens. *Ibid.* To prevent an urban debacle, local governments had to take over the ownership of mass transit systems all over the country. *Ibid.* Thus by 1980, public transit systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. *Id.* at 2.

The provision of mass transit services by public entities is not a profit-making operation. Rather, mass transit is provided at huge losses to serve the public good. *Prior Brief* at 7, 22. The losses are financed and subsidized by local governments in the same way that they finance and subsidize other basic public services. *Id.* at 7. Mass transit systems are also administered by local governments in the same way as other basic public services. *Id.* at 6-7.

For all these reasons, then, the provision of mass transit services is an essential governmental function of local jurisdictions.

B. Not only is mass transit a vital governmental function of local jurisdictions, but this case also involves another essential function of state and local governments: the power to set the wages of their employees. This power is crucial to state and local governments because it involves their budget priorities and their ability to adequately provide services. Thus, this Court recognized in *NLC v. Usery* that the authority to establish the wages of such employees is a fundamental attribute of state sovereignty. 426 U.S. at 845.

C. Federal regulation under the FLSA would gravely impair the essential functions of local governments at issue here. For the FLSA does not take account of the fact that publicly owned mass transit systems must develop innovative work schedules; it does not take account of the need for split shifts or of the fact that transit workers receive premium compensation for a significant portion of their regular work week. *Prior Brief* at 9-10, 25-26. Application of the FLSA would result in dramatically increased costs and losses for public transit systems and would adversely affect the ability of local governments to adequately provide a service essential to scores of millions of citizens. *Ibid.*

D. Federal regulation under the FLSA will not serve any overriding interest of the national government. Public transit workers receive wages three times as high as the minimum wage prescribed by the FLSA, and their wages have long exceeded or been closely comparable to those of workers in numerous well-paid lines of employment. *Prior Brief* at 7-8, 27. Transit workers also have fair working hours. *Id.* at 9-10, 25-26.

Moreover, public transit workers are in a much different strategic position than the victimized employees for whom the FLSA was enacted. *Prior Brief* at 9. A strike by public transit workers could cripple a city, and these workers therefore have a powerful bargaining position that generally is secured by mediation or com-

pulsory arbitration. Transit employees are thus assured of fair treatment.[11]

E. Finally, the FLSA is not tailored to further a federal interest in a manner that works the least harm to the ability of local jurisdictions to perform a crucial governmental function. To be so tailored the FLSA would have to take account of the need to have split shifts and to provide premium pay for a significant number of normal working hours. But as said above, the FLSA does not consider these matters. Instead it imposes wage and hour requirements that limit the flexibility of publicly owned mass transit systems, that would greatly increase the costs and losses of these systems and that would decrease their ability to adequately serve the public.[12]

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[11] The foregoing federal interests expressed in the FLSA are the only ones at issue here. There is not and could not be a claim that any other federal interest is at stake. Thus there is no claim that application of the FLSA to transit workers is necessary to assure the adequate purchasing power upon which the national economy depends. Nor is there any claim that federal regulation is necessary because state and local governments have been unable to derive local solutions for labor problems having a serious adverse national impact. All such claims would be frivolous.

[12] The brief of the Solicitor General seeks to elide these points by claiming that, under 29 U.S.C. 207(e)(5) and (7), the FLSA "expressly provides for exclusion of various forms of 'extra compensation' in establishing an employee's regular rate of pay." Thus, says the Solicitor General, "it has never been determined . . . that existing premium pay arrangements [for public transit workers] must be treated as part of the 'regular rate' to which overtime is applied." *Supp. Br. Sec.* at 29-30, n. 11.

The Solicitor General's interpretation of the law is insupportable on the face of the statute—it is indeed contradictory to the plain language of the statute. To be excluded under § 207(e)(5) from the employee's "regular rate" of pay, premium payments must be made for hours worked (1) in excess of eight per day, or (2) in excess of the employee's normal or regular hours, or (3) in excess of his maximum workweek. But the premium payments made by public mass transit systems are for work done *within* these limitations, not *in excess* of them. That is, they are for work that is part

V. The Three-Pronged Test Currently in Use is Unsatisfactory. It Fails to Protect Federalism and Each Prong Gives Rise to Serious Difficulties

Amici believe the balancing test described above should replace the current three-pronged test developed under *NLC* and its progeny.[13] In *amici's* view, the three-

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of the employee's eight hour workday, and that is within his regular and normal workday and workweek. Thus, under § 207(e)(5) such premium payments are *not* excludable from the employee's regular rate.

To be excludable under § 207(e)(7) from an employee's regular rate, premium payments must be made for work in excess of the employee's normal or regular workday or workweek and must be at least one and one-half times the rate established for such workday or workweek. But, again, the premium payments made by public transit systems are for work done *within* the regular workday and workweek. Nor are they necessarily one and one-half times the rate for such workday or workweek. For both these reasons they are not excludable from the regular rate under § 207(e)(7) either.

Finally, after erroneously claiming that under the statute premium payments are excludable from the regular rate, the Solicitor General argues that, even if they are not excludable "in some cities," the FLSA would not require "that overtime be paid on the basis of such premium rates in the future." For "it remains open to management and labor to renegotiate existing premium pay arrangements in light of the requirements of the FLSA to assure that aggregate compensation is not increased." This argument, of course, is a direct concession that the FLSA *would* interfere with local governments' ability, under existing arrangements, to carry out the important function of providing mass transit. The argument also is a burdensome demand that, to satisfy the FLSA, local governments should renegotiate carefully drafted and often controversial collective bargaining agreements.

[13] If the three-pronged test were to remain the governing standard under the Tenth Amendment, then it should be construed in accordance with principles urged in *amici's* briefs. Under those principles the judgment in favor of appellees must be affirmed.

We also note that the balancing test suggested by *amici* has elements in common with two doctrines utilized under the three-pronged test. One such doctrine is the Court's oft-repeated statement that Congress cannot " 'exercise power in a fashion that impairs the States' . . . ability to function effectively in a federal

pronged test is unsatisfactory because it fails to protect federalism and because each of the prongs presents serious intellectual and practical difficulties.[14] That the test provides little protection for federalism is shown by the fact that it seems to be extraordinarily difficult for state and local power to survive under it. State and local power has been defeated in every case decided under the test in this Court and in nearly every one of the large number of cases decided under the test in lower courts.[15] Furthermore, such losses can be expected because, as shown by

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system.'" *NLC v. Usery, supra*, 426 U.S. at 843, quoting *Fry, supra*, 421 U.S. at 547; *United Transportation Union v. Long Island Railroad Company*, 455 U.S. 678, 686-687 (1982). The other is that, even if the three-pronged test is met, the state or local interest might be overridden if the federal interest is powerful enough to justify submission.

[14] While *amici* strongly disagree with the three-pronged test, they find it understandable that its various prongs were developed in cases subsequent to *NLC v. Usery*. For a number of those cases exercised hydraulic pressures upon the decisionmaking process. *See, e.g., Hodel v. Virginia Surface Mining and Reclamation Association, Inc., supra*, and *FERC v. Mississippi, supra*. Such cases presented critical national economic problems relating to energy shortages and despoliation of the environment. Individual states were unable to solve the problems, in part because they were rivals in promoting the industries which caused them. Extensive hearings on the problems had been held by organs of the federal government, and national solutions had been painfully worked out over extensive periods of time. In the circumstances there were hydraulic pressures to aviod striking down the crucial federal efforts, and it is understandable that the cases resulted in standards adverse to state power.

[15] In addition to cases cited in *amici's* initial brief (p. 8, n. 7), *see, e.g., Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir.), cert. denied, 454 U.S. 1081 (1981); *Hughes Air Corp. v. Public Utilities Commission of the State of California*, 644 F.2d 1334 (9th Cir. 1981); *United States v. Helsley*, 615 F.2d 784 (9th Cir. 1979); *Vehicle Equipment Safety Commission v. National Highway Traffic Safety Commission*, 611 F.2d 53 (4th Cir. 1979); *Public Service Co. of North Carolina v. Federal Energy Regulatory Commission*, 587 F.2d 716 (5th Cir. 1979); *Hewlett-Packard v. Barnes*, 425 F.Supp. 1294 (N.D. Cal. 1977), aff'd, 571 F.2d 502 (9th Cir. 1978); *Standard Oil Co. v. Agsalud*, 442 F.Supp. 695 (N.D. Cal. 1977); *Friends of the Earth v. Carey*, 552 F.2d 25

an analysis of each of the three prongs, they inherently are a graveyard for state and local powers.

A(i). The first prong is that federal action must regulate the state *qua* state. This prong enables the national government to defeat state governing authority by directing its action toward private parties instead of overtly regulating the states. In this way the national government can override state power, without possibility of Tenth Amendment challenge, even in areas that may properly be within the governing province of state and local governments.

The point can be illustrated by numerous examples. For instance, this Court has ruled that state and local governments have the power to locate their capitals where they wish. *NLC v. Usery*, *supra*, 426 U.S. at 845, citing *Coyle v. Oklahoma*, 221 U.S. 559 (1911). The same would be true regarding state schools, libraries, hospitals and abortion clinics. A federal law which says "the state of X shall not locate" one of these institutions in a particular area is a regulation of the state *qua* state. The law therefore would be challengeable under the Tenth Amendment. But the national government could escape this limitation on its power by simply saying that "no individual shall participate" in constructing the institution in a particular area. Because the federal law is now addressed to individuals rather than the state, it is now unassailable under the Tenth Amendment.

The same type of example can be extended into every single area of state and local authority, and the argument has in fact been used by the national government in various areas of state power. Thus, the point applies whether one is discussing work done by state and local employees (as in the current case), speed limits applied on local roads, state efforts to stop pollution, state and local efforts to cure slums, or any other matter. In every instance, state authority can be thwarted by simply

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(2d Cir. 1977); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977).

addressing a federal law to individuals rather than to the state itself. The state *qua* state requirement thus provides the national government with a ready escape from Tenth Amendment limitations on its power.

(ii). The national government argues for retention of the state *qua* state requirement. It says the requirement is necessary because Congress possesses exclusive and undivided power over interstate commerce, and can preempt state laws regulating private activity that affects such commerce. For these reasons it asserts that the Supremacy Clause demands the requirement. *Supp. Br. Sec.* at 10-11.

Of course, it is incorrect to assert that Congress has sole power over interstate commerce. As recognized in cases from John Marshall's time to the present day, the states too have power over aspects of such commerce. *E.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). This is even more true now than in former years, since today the concept of interstate commerce has been expanded to the point where it encompasses actions which are basically local in character though they have some small or remote effect on interstate commerce.

Beyond this, there is no reason why the state *qua* state requirement is needed to carry out Congress' power to regulate interstate commerce. In appropriate cases that power can prevail regardless of whether a federal action is directed to states or to private parties. The commerce power is central to the creation of the national government. If it is invoked for purposes also central to such creation—*e.g.*, to stop state discrimination against interstate commerce—and if its use is tailored to accomplish the federal objective with the least harm to state authority, then the federal action will prevail.

Finally, the Supremacy Clause in no way mandates the state *qua* state requirement. The Clause says that the

Constitution and laws of the United States pursuant thereto are the supreme law of the land. This mandate has nothing to do with whether a Congressional law affects private parties or states.

B. The second prong is that the federal action must affect "indisputabl[e] 'attribute[s] of state sovereignty'." *Hodel, supra*, 452 U.S. at 287-288, quoting *NLC, supra*, 426 U.S. at 845. This prong causes "difficulties," since its meaning is "somewhat unclear" and there has been "little occasion to amplify on our understanding of the concept." *EEOC v. Wyoming, supra*, —— U.S. at ——, 103 S.Ct. at 1061 & n. 11. Beyond this, the concept seems redundant and unnecessary because any power required for states to effectively govern and serve their citizens should be an attribute of state sovereignty.

Moreover, the requirement that a power be an *indisputable* attribute of state sovereignty is enormously destructive of state power and of federalism. For the state and its sovereignty can continue to exist even if numerous powers are stripped from it, and such powers thus are not *indisputable* attributes of state sovereignty. For example, the state and its sovereignty can exist even though the state does not provide schools, or even though it does not provide hospitals and other health facilities, or even though it does not provide parks and recreation facilities, or even if it does not provide fire protection, or even if it does not clear away slums. The powers necessary to do these things are thus not *indisputable* attributes of sovereignty, and under the second prong would be ineligible for Tenth Amendment protection even though the Court has already stated in *NLC* and its progeny that many of these powers *are* attributes of sovereignty.

C. The third prong is that federal action must "directly impair [the states'] ability to structure integral operations in areas of traditional governmental functions." *Hodel, supra*, 452 U.S. at 288. There are several unsatisfactory aspects of this prong.

The requirement that an impairment be "direct" enables the federal government to injure state governing power by methods that are *indirect*. For example, as discussed earlier, the federal government could impair state authority by couching a law in terms of what individuals can do rather than in terms of what states can do. The *direct* effect of the law would be on persons but the law would *indirectly* strip the states of governing authority.

The requirement that federal action affect "integral operations" is unclear. If the phrase "integral operations" encompasses all parts of a state's activities—as would seem dictated by dictionary meanings—then it adds nothing and is for practical purposes meaningless. On the other hand, if it means matters which are essential to the existence of the state, then it excludes from protection numerous activities normally associated with states. For, as said above, states can exist though they do not provide schools, hospitals, parks, etc.[16]

Finally, the requirement that federal action affect "traditional" governmental functions is unclear, has produced extensive litigation (as in this case), and can be used to prevent states from exercising powers essential to coping with new economic, technological and demographic facts. That indeed is how some lower courts have used it in mass transit litigation. In such cases certain lower tribunals have held that the powers of state and local governments are confined by the situation which existed decades ago. See, *Alewine v. City Council*, 699 F.2d 1060 (11th Cir. 1983), petition for cert. filed sub nom. *Macon v. Joiner*, No. 82-1974, 51 U.S.L.W. 3884. Such holdings have arisen though this

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[16] If these or similar activities were excluded from "integral operations," such exclusion would be inconsistent with the essential principle that, subject to the limitations of the federal and state constitutions, the states may perform any function which is necessary to serve their citizens and is authorized by appropriate state governmental processes.

Court made clear, in *LIRR*, *supra*, 455 U.S. at 686, that the concept of traditional governmental functions "was not meant to impose a static historical view of state functions."

The historically frozen view adopted by some lower courts is being pressed upon this Court by the federal government. Thus, in its initial brief, the federal government said that "primacy" must be given to history in determining whether an activity is a traditional governmental function under the third part of the three-pronged test. *Brief for the Secretary of Labor* at 25. The government urged that mass transit does not meet the 'primacy" standard because mass transit systems historically were owned by private companies. *Id.* at 16-18. In its supplemental brief, the government says the standards for determining if an act is a traditional function "should be essentially, if not exclusively, an historical one." *Supp. Br. Sec.* at 17. Under this standard the federal law will prevail "where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area." *Id.* at 21.

The supplemental brief says its suggested test "does not adopt a 'static historical view of state functions.' " Rather, the test is "workable" because it "allows the states ample latitude for experimentation with, and expansion of, their services, while it precludes erosion of federal authority." *Supp. Br. Sec.* at 22-23. It also is said to prevent Congressional action from "drift[ing] into a status of unconstitutionality at some unascertainable future time." *Id.* at 24.

However, though the federal government has engaged in some verbal modifications of its position, it still is asserting the kind of static historical test that has been eschewed by this Court and that thwarts the need of state and local governments to assume new functions as required by changes in economic, technological and demographic facts. The federal government's new test would

freeze state powers as of the date of initial federal regulatory action, which often will be tens or scores of years ago (as in this case). States faced with new and far different problems, which must be solved if the interests of citizens are to be protected, will be disabled from acting in the public welfare unless they submit to federal rules—rules that may be outdated and ineffective, and that too commonly take little account of local needs. Rather than having "ample latitude for experimentation with, and expansion of, their services", states will be stifled unless they conform to federal demands. Whether the subject is schools, traffic, sanitation, pollution, hospital services, welfare or topics yet unknowable, states will be unable to meet new and changing needs free of the hand of the federal government laid on in times past.

The undesirability of the test now urged by the federal government is thus self evident. It is not to be escaped by arguing that the test "prevents the erosion of federal authority." States do not act because they wish to erode federal authority. They act to solve problems. Often they are compelled to act precisely because the exercise of federal authority has *failed* to solve the problems.

Nor can the undesirability of the federal government's test be escaped by arguing that it prevents federal action from "drifting" into unconstitutionality. Earlier federal action will *not* be unconstitutional except insofar as it prevents states from later undertaking efforts needed to govern effectively.[17] Moreover, even if the judicial view of the lawfulness of federal legislation were to change as real-world facts change or as the understanding and perception of them changes, this certainly is no new departure in constitutional adjudication. Rather, such change in constitutionality has been the life-

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[17] In analogous situations this Court has often ruled that statutes lawful on their face are unconstitutional as applied to specific fact situations.

blood of the living Constitution. This Court's view of the federal government's power to regulate economic affairs changed dramatically earlier in the century as economic facts came to be better understood. The power of government to act against certain unpopular groups receded at the hands of the judiciary as perceived threats to the country receded. The legality of malapportioned legislatures changed as the consequences became more dramatic. The rights of those accused of crime have been altered, often at the request of the national government, as judges came to a different appreciation of the results of governing rules. Thus, the possibility of changes over time in perceptions of whether federal action is lawful under the Tenth Amendment is no argument for denying protection to states. It is, rather, an example of the vitality of the Constitution.

D. Thus, each prong of the three-prong test has serious deficiencies, and individually and collectively the prongs gravely impair the power of states in our federal system. Rather than follow the three-pronged test, the Court should adopt the balancing test urged by *amici*. That balancing test is fair to both the national and state governments, is consistent with federalism, and comports with the balancing approach followed by this Court in many other areas of the law.

CONCLUSION

For the foregoing reasons, and those stated in *amici's* prior brief, this Court should affirm the decision below.

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Nos. 82-1913 and 82-1951

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On Appeals From the United States District Court for the Western District of Texas

BRIEF OF AMICI CURIAE California, Connecticut, Hawaii Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming

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INTEREST OF THE AMICI CURIAE

The states identified above submit this brief *amici curiae* to address the Court's question "[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered." The states endorse the principles of federalism enunciated in *National League of Cities*, and suggest here the contours of a revised analysis of state immunity which would ease judicial application of those principles, yet preserve the separate and independent role of the states.

The interests of the *amici* relevant to the question posed by the Court include, of course, the preservation of the states' autonomy and their identities as independent repositories

of sovereign authority within our federal system. The states also hold a correlative interest in preserving the constitutionally mandated balance between the powers of the federal government and those of the states. The continued harmony of those powers ensures the preservation of the republican democracy envisioned by the Framers. Retreat from the principles articulated in National League of Cities would free the central government from the restraints wisely fashioned by the Framers to preserve liberty and to nurture the democratic spirit. As sovereigns performing a broad range of functions to promote the welfare of persons within their borders, the states are uniquely qualified to suggest clarifications of the principles of National League of Cities which might

ease judicial application while maintaining the object of its holding.

SUMMARY OF ARGUMENT

The debates on the framing of our Constitution and two hundred years of experience testify to the integral role of vital, autonomous states in the plan of our government. As checks on the concentration of all power in the national government, and as instruments of self-government through which the people may address their intimate daily concerns, the states are among the chief means by which the framers hoped to "secure the blessings of liberty." The decisions of this Court have repeatedly acknowledged the critical role of the states in the federal system.

In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court

reaffirmed these tenets and the principle, recognized in other contexts, that the sovereignty of the states constitutes a fundamental limitation on the powers delegated to Congress. There is no escape from this conclusion, unless it lies in abdication of the judicial role in interpreting and upholding the principles of federalism and separation of powers, which are embodied in the Constitution.

The cases following National League of Cities have drawn from that case a three-pronged test for determining when Congress has unconstitutionally infringed state sovereignty. In that this test appears to embody a categorical approach to the question, deciding cases by determining whether a function undertaken by the states is or is not a sovereign function, the amici states submit that it fails to respect the democratic choices

of the people acting through their state governments, and fails to reflect the fluidity and dynamism of the constitutional scheme. There are few limits in the Constitution on the field within which the states may act, and the adjustment of conficts between national and state interests should not be accomplished by limiting states, but not the federal government, to the area occupied in the eighteenth century.

The Court should therefore recognize that when congressional actions under the Commerce Clause are challenged as intruding upon state sovereignty, it is called upon to balance the strength of the federal interest in regulating the states as states against the seriousness of the intrusion upon state sovereignty.

If there is inconsistency or confusion in the test previously applied by the Court, it may arise from the difficulty of defining the "rights" of states viewed as mere corporate entities. The states therefore submit that an alleged infringement of their sovereignty should be assessed in light of their role, as instruments of self-government, in the constitutional scheme. The constitutionally relevant injury is not the displacement of the substance of a local choice, but of the choice itself, or of the political processes through which the choice is made and expressed. Although the test currently applied by this Court should be replaced by a balancing of interests, the elements of the current test are nonetheless helpful in striking the balance.

Finally, the amici states argue that the case before the Court should not be decided by reference to the history of state or federal activities, since history reflects only the needs of a simpler time. Rather, the Court should consider the predominantly local nature of public mass transit, the choice of the people to secure the service through their local governments, and the congressional endorsement of that choice. The states submit that the balance in this case tips against the extension of the FLSA to public mass transit employees.

ARGUMENT

I. THE DECISION IN NATIONAL LEAGUE OF CITIES ACCURATELY REFLECTS THE PRINCIPLES OF OUR FEDERAL CONSTITUTIONAL STRUCTURE.

Two centuries of constitutional litigation and debate leave no doubt that

the political autonomy of the states necessarily limits the otherwise permissible activities of the national government. The longstanding controversy over principles of intergovernmental immunity concerns not the existence of the limitation, but only the proper line of its demarcation. The debate is renewed with the suggested reconsideration of National League of Cities, 426 U.S. 833 (1976), a decision which reaffirmed state sovereignty as a limitation on the federal commerce power. Although further clarification and elaboration of the analysis is appropriate, its wholesale displacement is not; the structure of our federal system, the constitutional text, and intervening judicial decisions attest to the "separate and independent existence" of the states and to the endurance and significance of the immunity protecting

their core operations from congressional intrusion under the banner of commerce regulation. See National League of Cities, 426 U.S. at 851.

1. While the text of the Constitution provides few, albeit significant, indicia of the states' autonomy,[1/] their continued sovereignty is, nonetheless, an essential feature of the Framers' federal system. The Constitution assumes the existence of the states,

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1/ For example, Article I, § 8, cl. 16, reserves "to the States respectively" the power to appoint the officers of any militia for which Congress might provide. Article I, § 9, cl. 5, denies Congress the power to lay any tax or duty "on Articles exported from any State." Article I, § 9, cl. 6, prohibits Congress from discriminating among state ports in its regulation of commerce or revenue. Article IV, § 3, denies Congress the power to divide or join states without their consent. Article V, governing the amendment process, provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

and focuses chiefly on the scope of national powers. The Framers viewed the structure of the new government -- the separation of powers among the branches and between the national and state governments -- as the primary security for "the blessings of liberty" won in the War of Independence.[2] In response to the opponents of the proposed constitution, who feared the concentration of power in a national government and the destruction of state sovereignty,[3]

2/ "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." The Federalist No. 51, at 323 (J. Madison) (Mentor ed. 1961). (All citations to The Federalist papers in this brief are to the 1961 Mentor edition.)

3/ See J. Main, The Anti-Federalists, Critics of the Constitution 120 (1961).

the Federalists relied upon the state governments, as alternative sources of authority and objects of loyalty, to curb any tendency of the national government toward unresponsiveness, excessive centralization and tyranny. The Federalist No. 17 at 119, (A. Hamilton), No. 46 at 298 (J. Madison). The efficiency and accountability of the state governments made them an effective "counterpoise" to the threat of overreaching national authority. Id. The sovereign authority of the states is guaranteed by the constitutional structure, and functions as a limit upon congressional action which threatens that independent status.

The structural assumption of state autonomy is not to be found exclusively in the Tenth Amendment. Its literal terms indeed state a "truism," United States v. Darby, 312 U.S. 100, 124

(1941), or "may be deemed unnecessary," 1 Annals of Cong. 441 (1789), but they nevertheless reflect an underlying constitutional limitation on the national government. They echo the common understanding that the Constitution establishes a national government of only limited powers, leaving to the states the residuum of sovereign authority. See The Federalist No. 9 at 76 (A. Hamilton); J. Main, The Anti-Federalists, supra at 155. The Tenth Amendment thus manifests "the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n. 7 (1975).

These structural protections are not infallible, as the Framers knew. For

the powers reposed in the central government to be effectively cabined, the states themselves must remain strong both to serve as effective critics of the central government and to nurture the democratic spirit. To remain strong, the states must retain the confidence and affection of their citizens. This they cannot do except as they remain accountable, effective instruments of self-government.

The federal structure nurtures the democratic spirit by leaving control of local matters to governments more accessible to the people and more responsive to local conditions.[4/] The value of the states in this scheme does not lie,

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4/ See The Federalist No. 17 at 119-20 (A. Hamilton), No. 45 at 292-93 (J. Madison).

as some suppose, in an assumed individual right to particular governmental services,[5/] or even in the greater merit of local decisions, but in the states' role as instruments of self-government. Still, because there can be greater participation in state government and because the states are closer to local concerns, the states may serve, and often have served in our nation's history, as laboratories for experimentation and development of social and economic ideas. See Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis,

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5/ See Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065 (1977); Michelman, States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery, 86 Yale L. J. 1165 (1977).

J., dissenting). Only last term this Court saw dramatic evidence of that truth. See Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2431 (1984). The challenge of individual state experimentation, both the successes and the failures, keeps the nation supple as it feeds the confidence of the people in democratic government.

2. The Court has long recognized the intergovernmental immunities, both explicit and implicit in the Constitution, which protect the essentials of state sovereignty. For example, the implied restrictions on the national taxing power were first articulated in Collector v. Day, 78 U.S. (11 Wall.) 122 (1871), holding the salary of a state judge immune from taxation. This immunity was derived solely from the states'

autonomy in the constitutional scheme, which presupposes and guarantees the continued existence of the states as governmental bodies performing traditional sovereign functions. See Massachusetts v. United States, 435 U.S. 444, 454 (1977) (opinion of Brennan, J.). The extension of the states' tax immunity to state officers was eventually abandoned, see Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); Helvering v. Gerhardt, 304 U.S. 405 (1938); but the fundamental principle -- the states' implied constitutional immunity from federal taxation -- endures to protect the states from undue interference in the performance of the sovereign functions of government. New York v. United States, 326 U.S. 572, 587 (1946) (Stone, C.J., concurring).

A similar acknowledgement of the states' autonomous, sovereign existence is evident in the limitations on the reach of the judicial power of the national government. By its terms, the Eleventh Amendment forecloses federal jurisdiction in suits against a state by the citizens of another, yet the Court properly saw in it a more general principle which precludes suits against the state by its own citizens as well. Hans v. Louisiana, 132 U.S. 1, 15 (1890). The Eleventh Amendment is "but an exemplification" of the more basic principle of the sovereign immunity of the states as a constitutional limitation on the federal judicial power. Ex parte New York, 256 U.S. 490, 497 (1921); see also Pennhurst State School and Hospital v.

Halderman, 104 S.Ct. 900, 907 (1984).[6/]

Similar judicial recognition of the significance of the unimpaired sovereignty of the states in this federal system is also apparent in such decisions as Coyle v. Smith, 221 U.S. 559 (1911), and Lane County v. Oregon, 74 U.S.(7 Wall.) 71 (1869). Thus, the essential feature of the federal constitutional structure -- the continued independent sovereignty of the states -- fixes the principle of intergovernmental immunity that affirmatively limits the reach of the national authority.

6/ The principles of federalism derived from the constitutional structure serve also to limit otherwise appropriate federal jurisdiction in order to preserve the legitimate and separate functions of the states and their institutions. See, e.g., Younger v. Harris, 401 U.S. 37, 44-45 (1971); Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976).

3. It is against this backdrop that the correctness and vitality of National League of Cities must be assessed. There the Court held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended the federal minimum wage and maximum hour provisions to state and local employees. Although within the scope of the Commerce Clause, the wage and hour regulations displaced "the States' freedom to structure integral operations in areas of traditional governmental functions," id. at 852, and thus exceeded the reach of congressional authority. In contrast to the permissible regulation of private individuals, who are necessarily subject to the dual sovereignty of federal and state governments, the FLSA was directed against the "States as States" and infringed upon

"attributes of sovereignty" which may not be impaired by Congress. Id. at 845.

In reaching this conclusion, the Court did not rely exclusively on the Tenth Amendment as the source of this affirmative limitation on the commerce power. Rather, the principle of intergovernmental immunity derives from the constitutional structure, which implicitly and explicitly recognizes "the essential role of the States in our federal system of government." Id. at 844. The Tenth Amendment merely exemplifies the structural barriers to federal intrusion upon state sovereignty.

As National League of Cities acknowledges, the states are not just corporate bodies, like any other, but are instruments of self-government constitutionally immune from congressional impairment or subversion. From this perspective, the

application of the FLSA to the states was unconstitutional as an interposition of foreign regulation between the citizens and their governments. Insofar as it was intended to override contrary state law without regard to the functions served by the covered employees, the FLSA dramatically limited local democratic choice and impaired the ability of the people to govern themselves.[7/] The disruption of state sovereignty wrought by the FLSA extension lay not only in

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7/ The dissent in National League of Cities suggested that the FLSA was likely to have little practical effect on state choices. 426 U.S. at 873-75 n. 12. If so, this simply means that the interposition of federally created employee rights was gratuitous. The lesson for the citizens of the States was nevertheless that their governments were not their own.

Furthermore, in assessing National League of Cities, one cannot ignore the

(footnote continued)

the economic consequences, but in the diminution of the states' authority to debate and decide the terms and conditions under which important state services are provided and the consequent erosion of popular confidence in and allegiance to state government.

It seems proper to add at this point that the alternative to the course chosen in National League of Cities -- return to the reasoning of Maryland v. Wirtz,

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implications of a decision upholding application of FLSA to state employees. The theory upon which the act was passed was the same used to support enactment of more thorough regulation of employer-employee relations. See Maryland v. Wirtz, 392 U.S. 183, 191-92, 194-95 (1968). Absent a ground for distinguishing the FLSA from any other regulation of public employment, and Wirtz promised no such limitation, a decision upholding the statute would be tantamount to a decision that Congress could nationalize all aspects of the relation between a state and its employees.

392 U.S. 183 (1968) -- is clearly unacceptable. It is instructive to recall that in Wirtz the Court held that state concerns, however characterized, may never "constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U.S. at 195. Although the Court was confident that it has "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity,'" id. at 196, the only power identified was the Court's authority to determine the scope of the Commerce Clause itself. Yet continued state autonomy cannot confidently be made to depend on the Court's authority to identify intrinsic limits on the commerce power. Compare id. at 196-97 n. 27, with L. Tribe, American Constitutional Law 242 ("contemporary Commerce Clause doc-

trine grants Congress such broad powers that judicial review of the affirmative authorization for congressional action is largely a formality"). Congress has used its power under the Commerce Clause to destroy; and so used, the power has been strongly defended. See Hammer v. Dagenhart, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting).[8/]

8/ The conclusion in Wirtz, that under the Commerce Clause there is no basis for distinguishing between sovereign states and private businesses, in itself demonstrates the futility of reliance upon intrinsic limits on that power. Of course there are distinctions, and they are constitutionally based. For one thing, the states, but not private businesses, possess governmental powers. For another, as even Wirtz acknowledges, the continued existence and vitality of the states, but not private enterprises, is an assumption underlying the constitutional structure. The conclusion that those differences are not significant under the Commerce Clause belies any hope that intrinsic limits in that provision

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If we accept the assurance in Wirtz that the Court has "ample power" to preserve the states, but at the same time recognize that review of congressional power under the Commerce Clause is limited, we must then conclude, despite the opinion, that there are constitutional commands extrinsic to the provision that limit Congress's power to intrude upon state sovereignty. Consequently, the Court's decision in National League of Cities, however imperfect, is preferable to the contradiction and obscurity of Wirtz. The conclusion of National League of Cities was therefore correct: considerations of state sovereignty, not just the Tenth Amendment, necessarily limit

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will sufficiently preserve the states' sovereignty.

the reach of congressional commerce authority in matters affecting the integral operations of the states.

Following National League of Cities there emerged the now familiar three-pronged test for assessing the constitutionality of commerce power legislation: (1) the challenged statute must regulate the states as states; (2) the federal regulation must address matters that are indisputably attributes of state sovereignty; and (3) the states' compliance must directly impair their ability to structure integral operations in areas of traditional governmental functions. In addition, despite satisfaction of these criteria, the federal interest advanced may be so strong as to justify state submission. Hodel v. Virginia Surface Mining & Reclamation Association,

452 U.S. 264, 287-88 and n. 29 (1981). This "test", however, reflects only some features of the appropriate constitutional analysis and is not well-suited to measuring federal intrusions upon the states' sovereignty. The amici states present below an analytical framework which incorporates the test in a balancing process and which, they believe, more faithfully preserves the principles and values of federalism.

II. THE APPROPRIATE FEDERALISM ANALYSIS ENTAILS THE BALANCING OF COMPETING INTERESTS.

A. Judicial Review Is Required.

With few exceptions, the reasoning in National League of Cities, if not always the result, has been criticized

by commentators.[9/] Even conceding that there are limits beyond which the commerce power may not extend, many commentators are prepared to have the Court abandon the effort to articulate those limits simply because coherent principles of decision have not been identified. See, e.g., Alfange, supra at 237-46. The critics attempt to rationalize the abandonment of judicial review by arguing that Congress will not transgress against the states because the interests of the states are represented or are otherwise adequately protected. See Alfange supra at 242-45 (and sources cited); Brief

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9/ See, e.g., Alfange, Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming, 1983 S. Ct. Rev. 215 (1983). But cf. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81 (1981).

of Appellant Joe G. Garcia on Reargument at 30.

This Court has not endorsed the view that judicial review of the great constitutional questions is unavailable to those who may be thought sufficiently represented in the political process. See National League of Cities, 426 U.S. at 841 n. 12. See also INS v. Chadha, 103 S.Ct. 2765, 2779-80 (1983); Massachusetts v. United States, 435 U.S. 444 (1978).10/ No party has argued or could argue that this case falls within the political question doctrine, the only available theory for denying judicial review. See INS v. Chadha, supra; Baker v. Carr, 369 U.S. 186, 313 (1962).

10/ Indeed, the Court has gone further than it is asked to go here, in resolving the intramural disputes of the other branches. See United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969).

Despite the criticism of the Court's intergovernmental immunity decisions on the ground of inconsistency, few suggest that judicially manageable standards simply cannot be found. Inconsistency of past decisions, if such there is, has never been considered a basis for ruling a question beyond judicial competence;[11/] it is, rather, a ground for renewed effort. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The plurality opinion in Northern Pipeline explains why this case is particularly appropriate for judicial decision: "The Federal judiciary was . . . designed by

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11/ Indeed, complete consistency of decisions might suggest that the law has ceased to grow and adapt. See O.W. Holmes, Codes and the Arrangement of the Law, 5 Am.L.Rev. 1, 1 (1870).

the Framers to stand independent of the Executive and Legislature -- to maintain the checks and balances of the constitutional structure. . . ." Id. at 57-58. As we have shown, the federal system too was conceived in part as a check on governmental excesses, and for that reason commands judicial protection as much as those provisions conventionally referred to as separation of powers provisions.

The Secretary relies on the theory of state representation in Congress, not to argue that the question is inappropriate for judicial resolution, but to suggest that substantial deference is due federal enactments which are alleged to infringe state sovereignty, particularly where Congress is shown to have considered the states' interests. Supplemental Brief for the Secretary of

Labor at 15-16. It is true that regional interests are represented in Congress; and to the extent that the Secretary's argument refers to federal constriction of state regulatory power under the Commerce Clause, we agree that deference is owing to congressional judgment.

It is a very different matter, however, to claim deference to a supposed congressional judgment that a federal enactment does not intrude unduly upon the integral operations of the states.[12/] Since the states are not represented as such in Congress, there is no assurance that their interests are adequately represented, just as the fact

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12/ See Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (states are not merely another shifting economic political factor to be considered by Congress).

that legislators are individuals does not guarantee that individual rights will receive adequate consideration in the legislative process.[13/] More likely, if the interests of states as such are raised at all, they will be invoked to serve other political interests. See L. Tribe, American Constitutional Law 242 (1978). It implies no disrespect or distrust of Congress to say that its judgment on the issue of state autonomy is entitled to no more deference than would be shown in a case alleging that Congress had invaded the executive prerogative or the rights of individuals. What this Court said in Chadha is equally appli-

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13/ Congress may, in fact, be less likely now than formerly to respect the claims of states as states. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 848, 860-83 (1979).

cable here: "The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 103 S.Ct. at 2784.

B. A Balancing Test Is Appropriate.

The danger to be resisted in cases such as this is not that Congress will destroy the states in a single action, Fry v. United States, 421 U.S. at 547 n. 7, but that its incremental actions, will "leave the states intact but functionally a gutted shell." L. Tribe, American Constitution Law 310. The central difficulty is that the Constitution distributes governmental authority among several centers without defining exhaustively the jurisdiction of each. Just

as the powers distributed among the branches of the federal government are not "hermetically sealed from one another," INS v. Chadha, 103 S.Ct. at 2784, so the powers delegated to the federal government and those reserved to the states are not mutually exclusive. It follows that the search for mechanical or mathematical rules of division between the centers of governmental authority is not only fruitless, but in fact inconsistent with the fluid, dynamic system envisioned by the Constitution.[14/]

The nature of the problem is not different in form from any case in which

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14/ It is no more desirable to draw a line around state sovereignty -- whether by reference to history or to some abstract conception of sovereignty -- than it is to limit the federal government's power by resort to eighteenth-century conceptions of interstate commerce.

the Court is called upon to resolve conflicts between rights or powers. See, e.g., Nebraska Press Association v. Stuart, 427 U.S. 539, 547, 570 (1976) (balancing fair trial and free press rights). In such cases, the Court is required to determine which of the two rights or powers must prevail in the particular case. Only rarely can this determination be made by reference to a specific constitutional provision. Thus, we believe that Justice Blackmun properly noted that decision in federalism matters involves a balancing process. National League of Cities, 426 U.S. at 856 (Blackmun, J., concurring). While later cases have treated this observation as a caveat, see EEOC v. Wyoming, 103 S. Ct. 1054, 1061 (1983), the states believe

that it is the essential feature of the decisional process.15/

The use of a balancing test does not require that the Court weigh the wisdom or desirability of federal legislation, or that it define precisely the contours of state sovereignty. On the contrary, respect for the legislative process and the need to preserve flexibility in governmental arrangements, preclude second-guessing such determinations. Cf. Hawaii Housing Authority v. Midkiff, 104 S. Ct.

15/ Certain federal actions are, of course, not subjects open to debate. It is settled that congressional action will prevail over state action regulating private conduct. This is the sense of the Court's emphasis that state sovereignty can limit commerce regulation only as it acts against the States qua States. See Hodel, 452 U.S. at 290-91. Similarly, congressional action to protect civil rights pursuant to the Fourteenth Amendment can trump the states' sovereignty. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

at 2331. It follows then that a rational exercise of admitted power by either the state or the federal government ought not to be denigrated.

Analogy to decisions of this Court in free exercise of religion cases is suggestive in this regard. Compare Davis v. Beason, 133 U.S. 333, 342-44 (1890) (Mormon's opinion regarding polygamy is not a religious belief), with Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) ("It is no business of the Court to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."). 16/ For similar reasons,

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16/ Cf. Wisconsin v. Yoder, 406 U.S. 205, 214-19 (1972) (inquiring into sincerity and centrality of asserted belief). Although we do not suggest

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inquiry whether an exercise of state power is "really" an exercise of sovereignty fails to respect state democratic choices. To the extent that any analysis requires a judgment that some state activities are "really not" exercises of state sovereignty, it should be abandoned. Cf. United Transportation Union v. Long Island Rail Road Co., 455 U.S. 678, 685 n. 11 (1982) (suggesting distinction between activities like business enterprises and traditionally gov-

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that the analogy is perfect, cases such as Wisconsin v. Yoder do offer a model for resolving conflicting claims of constitutional dimension. There, of course, the clash was between the clear state power to require education of children and the unequivocal right of the Amish freely to exercise their religion. In that the Free Exercise Clause protects another type of autonomy from federal intrusion, the analogy is not wholly amiss.

ernmental functions). For the same reason, the Court should reject any attempt to define state sovereignty by excluding all functions that might be performed by private business. See Brief of Garcia at 35-43. Such an attempt is antithetical to the respect that democratic decisions are constitutionally due.[17/]

In sum, the proper approach to the question posed in this case is to balance the intensity of the national interest in a particular regulation against the injury which it does to state sovereignty. As discussed below, the factors to be considered in this calculus include

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17/ We do not mean to suggest that the Court should blind itself to improper motivation. State action taken solely to defeat federal regulation need not be accorded weight. Cf. United Transp. Union v. Long Island R.R., 455 U.S. at 689.

the nexus between the federal regulation and the national concerns for which the Commerce Clause was adopted, the strength or immediacy of impact on the state activity to be regulated, and the degree to which the regulation intrudes upon state sovereignty. This approach incorporates the principles of National League of Cities, reflected in the three tests articulated in Hodel, as elements in the balancing process.

C. Factors To Be Employed in the Balancing Process.

In this part, the amici will suggest the factors to be assessed in striking a proper balance between the need to effectuate federal initiatives and the need to preserve the vitality of the states. The most vexing of these is the question whether, and to what extent, congres-

sional action intrudes upon state sovereignty. The confusion concerning this issue can be mitigated by analyzing specific congressional action in light of the functions served by the states in the constitutional scheme.

One factor to be assessed, in cases dealing with the exercise of the commerce power, is the proximity of the federal action to the core concerns of the Commerce Clause -- for instance, the removal of local impediments to the development of an integrated national economy. See Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935). Although judicial review of congressional authority to enact particular legislation under the Commerce Clause is largely a formality, L. Tribe, American Constitutional Law 242, certainly some exercises of the com-

merce power have a clearer and more direct connection with the core purpose of the clause than others.[18/] Where that connection is sufficiently direct, and regulation of the states as states is an integral part of the federal plan, state submission to such necessary regulation may be justified. E.g., Fry v. United States, supra.

Similarly, the impact of the state activity on interstate commerce must be assessed to determine whether the state must submit to federal regulation. This factor does not focus on whether the state is engaged in commercial activity, but instead inquires into the degree to

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18/ Compare Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (global navigation regulation) with Wickard v. Filburn, 317 U.S. 111 (1942) (local agricultural production).

which that activity affects the core concerns of the Commerce Clause. Thus, in the context of this case, the question is not whether the regulation of wages and hours of transit workers is within the scope of Art. I, § 8, cl. 3. The amici recognize that it is. National League of Cities, 426 U.S. at 841. Rather the relevant inquiry is an assessment of degree: How much of a burden on interstate commerce is created by exempting publicly employed transit workers from the FLSA? To what extent, if any, will such an exemption lead to economic Balkanization? If the answers to these questions suggest that honoring state prerogatives will come at great cost to the unity and vitality of the national economy, then the national government's interest may prevail. Conversely, if

the public employment of workers to operate a metropolitan mass transit system is only remotely related to interstate commerce, then the interests of the states may predominate.19/

Once the strength of the federal interest and the impact of the state activity have been ascertained, they may be balanced against the injury to state sovereignty posed by the federal regulation at issue. The opinions of this Court and commentaries upon them indicate that this last factor is the most difficult to assess.

19/ A similar assessment of the degree rather than the fact of conflict between national and local interests is a firmly established approach in cases involving state regulatory action claimed to violate the Commerce Clause. See, e.g., Raymond Motor Transportation, Inc. v. Rice, 397 U.S. 137, 142 (1970).

In Hodel, the Court identified two tests seemingly designed to assess the injury done to state sovereignty by congressional action. The first of these, that "the federal regulation must address matters that are indisputably 'attributes of the state sovereignty,'" Hodel, ___ U.S. at ___, has not proved significant in subsequent decisions.[20/] The second of the two tests which may be said to focus on injury is whether "the states' compliance with federal law would directly impair their ability to structure integral operations in areas of

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20/ However, in EEOC v. Wyoming, 103 S.Ct. at 1061 n. 11, the Court sought to give this test some content by suggesting a distinction between activities that are characteristic of a sovereign and activities which may be engaged in by a sovereign and a private body alike.

traditional functions." Hodel, 452 U.S. at 288.[21]

We believe that the "indisputable attributes" and "traditional functions" tests have not proven fully satisfactory because they may have been made to stand in place of a balancing approach, and consequently tend to restrict unduly the concept of state sovereignty. This latter problem would be exacerbated were the Secretary's "essentially, if not exclusively, historical" approach adopted. An essentially historical approach may be simple to apply, but to define the

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21/ The Court has twice resorted to this test to decide challenges to federal law. See EEOC v. Wyoming, 103 S.Ct. at 1062; Long Island R.R., 455 U.S. at 685. This test appears to have two elements, one directed to the bona fides of the affected state function, the other to the degree of harm to that or other functions.

role of the states by what they did in horse and buggy days is unfaithful to any conception of federalism as a dynamic system. Just such an historical reference was rightly rejected by this Court in the 1930's when urged as a limitation on the reach of the Commerce Clause. See, e.g., National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

In sum, the states believe that the injury done to them by federal action ought not to be assessed by reference either to an a priori or to an historical conception of state sovereignty or state sovereign functions. What this Court said in Long Island R.R. fortifies this view. There, the Court cautioned that "emphasis on traditional governmental functions and traditional aspects of

state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 455 U.S. at 686.

As we have argued, the Framers envisioned that the states would function as an effective "counterpoise" to the national government. Yet the states cannot serve this function unless they remain strong and independent. And, as the Framers understood, the strength of the states depends entirely upon their capacity to elicit the attachment of their citizens;[22/] no decree by Congress or a court can preserve a state that has lost this capacity.

22/ See, e.g., The Federalist No. 17 (A. Hamilton), No. 45 (J. Madison). See also Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81, 100-01 (1981).

The ability of the states to fulfill their role in the constitutional scheme is dependent solely upon their effectiveness as instruments of self-government. Thus understood, the role of the states in the constitutional scheme implies both that the states will remain autonomous instruments through which the polity may express its choices, and that there will remain an area within which those choices will be effective.[23/]

23/ The Framers recognized that the vitality of the states depends upon their ability to engage in effective action, and argued that a vast field for such action was reserved to the states in the Constitution:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to

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It is extremely important to recognize that the functions of the states in the constitutional scheme depend not at all upon an assumption that local control of local matters will yield better substantive policies or that it will enable more efficient provision of services or benefits. These are not transcendent concerns of our Constitution. Rather, the Constitution is concerned with establishing a frame of government within which democratic choice is guaranteed. For this reason, injury to state sover-

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> the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. The Federalist No. 45 at 292-93 (J. Madison); see also No. 46 at 294-95 (J. Madison).

eignty should not be assessed in terms of the importance or substantive merit of a particular state policy, but rather in terms of the effect upon self-government. For example, while federal taxation or relocation of a state capitol building might not measurably disrupt state activities, the message to the people -- that their government exists only at the sufferance of Congress -- would constitute an enormous injury.[24/]

24/ See Coyle v. Smith, 221 U.S. 559 (1911); New York v. United States, 326 U.S. 572, 582 (1946). In EEOC v. Wyoming, 103 S.Ct. at 1061 n. 11, the Court suggested that whether state employment decisions constitute exercises of an undoubted attribute of sovereignty may depend upon whether they are vehicles for executing some sovereign choice. The amici agree that displacement of democratic choice is a relevant consideration, but respectfully submit that, regardless of merit, decisions regarding public employment are necessarily decisions concerning the organization and

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Similarly, federal prescription of rights of state employees, or of rules or standards for the performance of local functions, such as fire prevention, police protection, sanitation, and public health, however justified or rationalized, fails to respect the role of the states as instruments of self-government. The merit of such regulation cannot mitigate the injury to democratic values; self-government implies freedom to make wrong choices, or to make no choices at all. If the federal government can regulate these matters, it can do so not because they are not matters pertaining to state sovereignty, but because, despite

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operation of state government. Displacement of those decisions teaches the people that the government is not wholly theirs.

the injury to that sovereignty, some intrusion is justified by overriding national concerns.[25/]

The tests articulated in Hodel can provide assistance in striking the balance between the federal regulatory interest and the injury to the state as an instrument of self-government. For instance, while the "indisputable attributes" test poses analytical difficulties, see EEOC v. Wyoming, 103 S.Ct. at 1061 n. 11, we believe that this test may be understood as a reminder that the

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25/ At the heart of state sovereignty, of course, are the political processes of government through which the polity expresses its will. The amici believe that federal commerce regulation intruding upon state legislative processes is simply not justifiable. The injury to the principle of self-government in such cases is too palpable and other less intrusive means of effectuating federal policy are too readily available to admit of such intrusions.

states are part of a federal system, and that many attributes of a sovereign nation do not inhere in them because of the equal rights of other states, because of the interests of the nation as a whole, or because the Constitution specifically withholds some power from the states, or delegates it exclusively to Congress. Similarly with regard to the "traditional functions" test, the amici states believe that the history of state responsibility for providing a service, together with other considerations, refers to the seriousness of an intrusion on state sovereignty, just as the history of federal regulation may assist in judging the weight of the federal interest.

On balance, however, we believe that a more significant factor is the extent to which the function in question has

been subjected to the state's political decisionmaking process, as evidenced, for instance, by funding through local taxes. This factor is a more reliable proxy than history for the underlying question: whether federal regulation intrudes upon a sovereign function. Moreover, it reflects what we have submitted is the relevant conception of state sovereignty for purposes of these cases -- that the states are instruments of self-government, and immune as such to federal impairment or subversion.

D. The Balance Tips Against Extension of the FLSA to Public Mass Transit.

As our discussion demonstrates, the decision in this case turns on whether the federal interest in extension of the FLSA to public mass transit systems out-

weighs the injury done to state sovereignty. Relying upon a rigid and myopic historical approach, the Secretary argues that because the states generally had not engaged in mass transit prior to federal intervention in the field, that activity is not a "traditional governmental function." But in view of the fact that the states, as well as Congress, have concluded that mass transit is a critical obligation of local government in default of a viable private system,[26/] the singular focus on the tim-

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26/ The Urban Mass Transportation Act represents a congressional acknowledgment that mass transportation is an essential service which is appropriately provided by state or local government. It scarcely becomes the Secretary now to imply that the states, which responded to these findings and to the will of their own citizens, are not in fact engaged in performing a governmental function because federal assistance enabled assumption of

(footnote continued)

ing of some state involvement provides an insufficient measure of the federal

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(footnote continued)

that function. Nor can the Secretary suggest that the FLSA be regarded as a post hoc condition on federal assistance under UMTA. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

Moreover, given the reality that federal taxing and spending policy has made the federal government a substantial partner in every state government, it cannot be assumed that state accession to federal conditions reflects a free choice. Cf. Employees v. Missouri Pub. Health Dept., 411 U.S. 279, 296 (1973) (Marshall, J., concurring). In any event, the distribution of federal tax money does not purchase absolution from the constitutional duty to respect state sovereignty. Cf. Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) (in distribution of unemployment benefits, state may not burden free exercise rights except to further a compelling interest). The Secretary's intimation that services provided with federal assistance should not be treated as true governmental activities, makes federal assistance into a poison, fatal to any state that swallows it. If we have correctly understood it, the Secretary's argument should be firmly rejected.

impact on the states' sovereignty. Indeed, the Secretary's approach arbitrarily fixes the scope of each state's autonomy by reference to the functions performed by all states. Yet the states are not fungible. It makes no sense to determine whether the provision of mass transit is a sovereign function by reference to states with little need for mass transit or for governmental assumption of such services.

In metropolitan Boston, for instance, mass transit has been provided by a public authority or quasi-public agency since 1918. See Helvering v. Powers, 293 U.S. 214, 220 (1934). The cost of operations and debt service, which substantially exceeds revenues, is paid by the Commonwealth and the municipalities within the service area. See Mass. Gen. Laws ch. 161A, §§ 8-13. When local ob-

jection to increasing expenditures threatened to close the system in 1980, the Governor proclaimed a public emergency and a shutdown was averted by additional state appropriations. See Massachusetts Bay Transp. Auth. Advisory Bd. v. Massachusetts Bay Transp. Auth., 382 Mass. 569, 417 N.E.2d 7 (1981). Finding that rising costs were attributable, in part, to inflationary labor agreements, the Legislature enacted statutes establishing "inherent management rights" which cannot be subject to collective bargaining or arbitration. See Mass. Gen. Laws ch. 161A, §§ 19, 19E; Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982). We cite this experience not to demonstrate that mass transit is a "traditional governmental function," but to

show that reliance on the history of a simpler time, or the experience in a majority of states, cannot properly define the central functions of the states as they assume new functions in response to changing demographic and economic reality.27/

Far more relevant indications of state sovereign functions beyond the reach of Congress are, on the one hand, the degree to which mass transit relates to local rather than national concerns

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27/ Uniformity of federal regulatory action is not threatened with this analysis, because uniformity, where essential to the effectuation of the national objective, is itself an interest which the Court can assess in the balancing process. Similarly unfounded is the Secretary's fear of "creeping unconstitutionality" (Supp. Brief at 28) from shifting patterns of state activity which might implicate otherwise valid legislation, since the history and priority of federal regulation are both factors relevant to the weighting of interests.

and, on the other hand, the extent to which the function has been subjected to the local political decision-making process. As with public safety, health, education, and recreation, National League of Cities, 426 U.S. at 851, the assured provision of public transportation is an essential feature of the daily lives of many people -- commuters, school children, and the elderly. No doubt public mass transit affects the national commerce, but the weight of its practical impact is felt locally, in its effect on the immediate, parochial needs of the population served, and in its connection to other peculiarly local government matters such as traffic management, land use planning, and public works. Unlike matters of commerce requiring continued national attention, cf. United Transportation Union v. Long Island R.R., 455

U.S. at 687 (common carriage by rail long subject to comprehensive federal regulation), local public transportation has never been the subject of a federal regulatory system. See Local Division 589, 666 F.2d at 633. Thus, citizen complaints, and perhaps praise, for the fares, the service, or the schedules of public mass transit systems are heard at the local level, not in Washington.

Nevertheless, with the interposition of the FLSA, certain complaints will be voiced at the national level -- those of the employees, who already participate in structuring mass transit operations through the local political process and collective bargaining. Superimposing a layer of federal regulation upon these processes further removes basic employment issues from the control of the local polity which is responsible for and de-

pendent upon the transit system. Unlike the private sector, to which the FLSA is generally directed, employment decisions in the public sector are essentially political matters. The intrusion of the national government in this local political process not only limits the range of choice but, more destructively, demonstrates to the state citizens that the government is not theirs. Thus, in the balance of federal and state concerns in public mass transit systems, the scale tips toward the protection of state choices free from federal interference.

CONCLUSION

For the foregoing reasons, the amici states respond to the Court's question in the negative. While the Court may certainly reconsider and improve the

analytical tools to be employed in cases implicating state autonomy, we believe that the principles of National League of Cities -- principles which permeate our Constitution -- should be reaffirmed. The resolution of this case should leave no doubt that the Court is prepared to protect the existence and foster the vitality of the states so that they may play the critical role reserved for them by the Constitution.

Respectfully submitted,

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Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

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SUPPLEMENTAL BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES, SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Supreme Court Rule 36.4 on behalf of the more than 1,700 local governments, which are political subdivisions of states, that are members of the National Institute of Municipal Law Officers [NIMLO]. The member local governments

operate NIMLO through their chief legal officers, variously called city attorney, county attorney, corporation counsel, city solicitor, director of law, and other titles. Each member local government has one vote on all actions taken by the NIMLO organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local governments and the chief legal officers of the members of NIMLO in their official capacity. San Antonio, Texas is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization that provides information and research to its member local governments on current legal problems of local concern, including mass transit labor issues and issues involving federal-local relations.

The local government attorneys who participate in NIMLO's work are responsible for negotiating and drafting labor contracts with municipal employee unions, including mass transit employee unions. The attorneys are also intimately involved in the budgetary processes of local governments and are responsible for advising local governments on the applicability of federal statutes and regulations to mass transit and other essentially municipal activities.

NIMLO reiterates the concerns mentioned in the statement of interest section of its original *amicus curiae* brief in these cases. In addition, NIMLO restates the fears addressed in the amicus curiae brief that it filed for this Court's consideration in *National League of Cities v. Usery*, 426 U.S. 833 (1976), namely that federalism principles, which define the constitutional order of this Nation, should not be ignored by expediency, especially where, as here, ignoring these principles would undermine

the foundation from which municipal governments can assert their federal constitutional rights.

While recognizing that application of those principles of federalism underlying *National League of Cities* can present difficulties for judicial and legislative bodies, NIMLO respectfully urges this Court not to abandon the wisdom of that decision, but to acknowledge its genesis as lying at the very roots of our constitutional system of government.

Consent to the filing of this brief has been granted by all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

This supplemental *amicus curiae* brief is filed to address the question posed by the Court of " '[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?' "

The question reserved for reargument is misleading, if read as suggesting that the decision in *National League of Cities* is dependent solely upon the provisions of the Tenth Amendment. In fact, that decision is supported by general concepts of federalism that were written into the entire Constitution for the very purpose of preserving the role of the states within our system of government, even while increasing the authority of the national government to exercise delegated powers.

However, while the *National League of Cities* doctrine is valid and should be retained, the intended scope of the decision has resulted in some confusion about the application of the doctrine. Subsequent related decisions

have limited its application, and further clarification of the basic doctrine might be possible by distinguishing the objective inquiry regarding a potential constitutional problem from the subjective analysis of whether challenged legislation is unsupported. In the instant case, the two-step approach suggested by *National League of Cities* and its progeny requires a finding that the challenged application of the Fair Labor Standards Act to local mass transit operations is an impermissible intrusion by the federal government into constitutionally protected state and local prerogatives.

ARGUMENT

I. THE *NATIONAL LEAGUE OF CITIES* DOCTRINE IS BASED UPON BROAD CONSTITUTIONAL PRECEPTS OF FEDERALISM, NOT MERELY THE TENTH AMENDMENT AS THE QUESTION RESERVED FOR REARGUMENT WOULD SEEM TO IMPLY

Contrary to the implication drawn from the question posed by the Court for reargument, the decision in *National League of Cities v. Usery,* 426 U.S. 833 (1976), was not the result of an analysis of only the Tenth Amendment, but of federalism principles throughout the Constitution. The Tenth Amendment does embody these principles, but is, by itself and on its face, perhaps the least convincing proof of the framers' intent in developing our constitutional system of federalism. In fact, in the Court's *National League of Cities* opinion, the Tenth Amendment is mentioned only once,[1] and there is no indication that its

[1] 426 U.S. at 842, discussing the Tenth Amendment as a declaration of limits imposed more broadly by the federal system on the regulatory authority of Congress, as recognized by the Court in *Fry v. United States,* 421 U.S. 542 (1975).

existence was dispositive of the case. Instead, *National League of Cities* recognized both the importance of the Commerce Clause[2] and that it is but one provision in a Constitution embracing strong principles of federalism.[3]

As suggested by the decision in *National League of Cities,* while the power of the federal government today may necessarily be far greater than that of the states, it certainly is not an absolute power over state and local sovereignty. The Constitution is a document that expands federal power in some areas and limits it in other instances; the Constitution does not abolish state and local governments, nor are states relegated to serving as agencies of or ministers for the federal government. The states are not creatures of the federal government, but clearly do have an existence independent from the federal government.

And, as in *National League of Cities,* the instant case involves a question of federalism relative only to Congress' commerce power, not its spending power. It does not present a situation where the federal government has imposed conditions on the receipt of federal grants; instead, it deals with a doctrine involving the exercise of constitutional authority over state sovereignty independent of the spending power. The narrowness of the ruling in *National League of Cities* is demonstrated by its progeny, and that decision does not threaten either proper congressional action pursuant to the Commerce Clause or action pursuant to any other delegation of power to Congress. Neither a general erosion of federal power, nor an undue expansion

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[2]U.S. CONST. art. I, §8, cl. 3.

[3]*See EEOC v. Wyoming*, 103 S.Ct. 1054, 1081 n. 13 (1983) (Powell, J., dissenting).

of local autonomy can be attributed to this Court's decision in *National League of Cities.*

Therefore, the question presented by the Court for reargument could be construed wrongfully and dangerously, because the Tenth Amendment, by itself, does not automatically preclude an exercise of federal power within the states' domain. Rather, what *National League of Cities* stands for – and what abandonment of that decision would threaten – are fundamental constitutional principles of federalism, of which the Tenth Amendment is merely one component.

Federal supremacy is not federal absolutism. Abandonment of *National League of Cities,* however, would result in more than federal supremacy; it would result in the total elimination of independent state authority. The Court should acknowledge this threat and ask, instead, whether state and local governments must in all instances be obsequious to every federal pronouncement, regardless of the respective interests. The answer should be clear, and *National League of Cities* only preserves from federal encroachment those limited instances in which the federal interest, if any, must give way to the states' interest.

II. OUR CONSTITUTIONAL SYSTEM OF FEDERALISM WAS DEVELOPED WITH AN INTENT TO PRESERVE THE STATES' ROLES IN GOVERNMENT WHILE STRENGTHENING THE AUTHORITY OF THE NATIONAL GOVERNMENT.

The Constitution was designed by its framers to be a practical document, with a broad orientation and noninclusive statements of principles. Its practicality was imposed by the need for compromise in order to ensure its initial ratification, but this characteristic has also operated

to facilitate the so-created government's adjustment to changed conditions throughout the last two hundred years. This is the recognized genius of the American Constitution; it renders adaptation easier, thereby ensuring the flexibility of government within the parameters of broad principles.

But, while certainly the Constitution was created to displace power from the states and reposit it instead with the federal government, the Constitution did not remove *all* power from the states and situate *all* power with the federal government. The doctrine of *National League of Cities* has hardly returned the country to the days of the Articles of Confederation.

Derivatively, the very nature of federalism, as constructed within the Constitution, is not that of well-articulated theory. Instead, federalism is "the peculiar product of a peculiar people, who would rather work within its limitations and imperfections than sacrifice it for theoretical purity and administrative precision."[4]

The substance of federalism was not really debated during the Philadelphia Convention of 1787, and even subsequent contemporary discussions of the concept reflected disagreement about its significance.[5] However, clearly the founding fathers were committed to limited government, believing "that power divided is power inhibited; and that power inhibited is tyranny prevented."[6]

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[4]RICHARD H. LEACH, AMERICAN FEDERALISM 221-22 (1970).

[5]*Id.* at 7-8.

[6]*Id.* at 5.

Basic to any analysis of the concept of federalism is acknowledgment that the federal government was originally created by the states, and amendments to the Constitution which ordain the federal government's structure must be ratified by the states. The states had never intended to surrender their independent sovereignty to a federal government and would not have ratified any document proposing such ε usurpation.

Within the constitutional system of federalism then, states are not merely colorful blobs on a map of the country. They function, with or without federal aid, in areas of day-to-day concern to their inhabitants that the national government would be unable to administer. Public health, safety and welfare are largely dependent on state and local government police power exercises and services relating to such activities as enforcement, licensing, inspections and record keeping. While the role of the national government at times may be more urgent, the continued and increasing relevance of the role of state and local governments is evidenced in the instant case. As the demand for public services on the state and local levels increases, these governments must be prepared to meet the needs of their citizens.

State and local elected officials are not employees or agents of the federal government, and in some narrow areas the federal government may not dictate to them. It would be unconscionable and unconstitutional to permit, pursuant to the Commerce Clause, the federal government, for example, to dictate by statute the qualifications or salaries for state and local officeholders, eliminate all local schools or prohibit the enforcement of valid local laws. Just as certain individual rights exist not by virtue of specific textual authority but because of the tone of the

Constitution,[7] so do states, and local governments, retain certain rights.

While it may be true that the future of federalism depends largely on the satisfaction of the electorate with its performance, the legal mechanism protecting the concept must remain viable. The tone of the Constitution definitely indicates that certain powers are left to the states. The doctrine that has evolved from *National League of Cities* operates "to ensure . . . the unique benefits of a federal system"[8] and properly analyzes what powers are retained by the states.

III. THE *NATIONAL LEAGUE OF CITIES* DOCTRINE MAY BENEFIT FROM SOME CLARIFICATION.

As discussed above, the Court does not need to and should not abandon the principles enunciated in *National League of Cities.* However, it may wish to clarify the kinds of consequential effects that should be considered relevant in determining whether state sovereignty is threatened by a particular federal enactment and how serious those consequences must be in order to invalidate a federal statute. Clarification could be aimed toward the perceptions of *National League of Cities* as placing all-encompassing, flexible restraints on federal action, and of subsequent cases as defining narrow, rigid tests that disregard policy concerns.

A review of *National League of Cities* and its progeny offers a two-step approach for analyzing federal action

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[7]Such as: the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and the right to educate one's children as one chooses, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[8]*EEOC v. Wyoming*, 103 S.Ct. 1054, 1060 (1983).

that is challenged as unduly interfering with state and local prerogatives. The initial required inquiry focuses on whether a *National League of Cities* federalism problem can be identified. If so, the concern becomes whether the federal interference is warranted.

A. An Objective Test Utilizing *Hodel's* Threshold Requirements Could Be The First Step In Analyzing a *National League of Cities* Challenge To Federal Enactments.

The cases subsequent to *National League of Cities* have suggested the approach for finding the threshold requirements for this kind of federalism problem. Applying the tripartite test set forth in *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264 (1981),[9] it can generally be determined whether the nature of federal activity encroaches upon areas that the states had preempted for themselves. The three-part analysis utilized in *Hodel* will roughly identify the constitutional boundaries of federal Commerce Clause legislation implicating state and local affairs. Because the *Hodel* test is presented as being inclusive, the three parts need not be considered in any particular order; the failure to satisfy any one element of the standard could defeat a *National League of Cities* challenge to a federal enactment.

The tripartite *Hodel* examination of challenged federal legislation should be treated primarily as an objective test. Admittedly, the terminology of the standard as phrased

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[9]The test requires showing that the challenged enactment regulates "States as States", it addresses matters that are attributes of state sovereignty, and compliance with the enactment would directly impair the ability of state and local governments "to structure integral operations in areas of traditional governmental functions." *Id.* at 287-88.

presents difficulties in interpretation and opportunities for subjective analysis. However, the opportunities for subjectivity should be deferred until the final step of analysis,[10] and the difficulties in interpretation should be handled on a case-by-case basis.

For example, a simple, strict historical construction of the phrase "traditional governmental functions" within the *Hodel* standard, while appearing deceptively easy, could exclude evolutionary state and local activities that would seem worthy of constitutional protection. However, the ability of the Constitution itself to be adapted to changing needs is renowned, and while the task of defining constitutional rights and limitations so as to anticipate the unknown and unforeseen is formidable, it should not be necessary to abandon the attempt. By admitting the difficulty, rather than defeat, the flexibility required to avoid a static view of "traditional" functions becomes inherent in the test, and some room is preserved for reevaluation of a specific function in the future. Although such an approach might appear to invite continuous appeals in cases involving certain state and local activities, the actual number of appeals is likely to be limited by practical considerations and the obstacles defined in applicable precedents.

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[10]See the discussion on balancing the federal with state and local interests (III.B.), *infra*, p. 12.

B. Any Subjective Analysis Of Challenged Federal Enactments Should Be Reserved For The Second Step of Review, In Which The Respective Interests Of The Federal Government And State And Local Governments May Be Balanced.

The second step in a *National League of Cities*-style challenge to federal action is also alluded to in *Hodel:* "There are situations in which the nature of the federal interest advanced may be such that it justifies state submission."[11] This balancing approach, where the federal interest in imposing Commerce Clause legislation on state and local governments is weighed against their interests in avoiding compliance, has been referenced or implied in related decisions both preceding and following *National League of Cities,*[12] and, in fact, can be read into *National League of Cities,* as well.[13]

As the second step in a federalism challenge to Commerce Clause legislation then, the balancing of interests requirement would inevitably involve elements of subjectivity.

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[11] *Hodel,* 452 U.S. at 288 n. 29.

[12] *See, e.g., Fry v. United States,* 421 U.S. 542, 548 (1975) ("effectiveness of federal action would have been drastically impaired"); *United Transportation Union v. Long Island Railroad Company,* 455 U.S. 678, 689 (1982) ("would destroy the uniformity thought essential. . .and would endanger the efficient operation of the interstate rail system"); *EEOC v. Wyoming,* 103 S.Ct. 1054, 1062-64 (depends on "considerations of degree" after analysis of consequential effects).

[13] 426 U.S. at 846-47 (reviewing examples and the "degree" of interference), 853 ("limits imposed upon the commerce power . . .are not so inflexible as to preclude temporary enactments tailored to combat a national emergency").

Distinct objective/subjective testing phases, which are first suggested in *Hodel* but can also be detected in *National League of Cities,* were unfortunately blurred in *EEOC,* however, and the result is a corruption of constitutional federalism. Once the *Hodel* threshold requirements are satisfied and a *National League of Cities* federalism problem is identified, the balancing test requires that the federal interest must be shown to outweigh the state interest if the federal enactment is to be applied validly to state or local governments. Yet, *EEOC* might imply that some federal interest can always be found to justify federal intrusion into state and local prerogatives.[14] In effect, state and local governments opposed to Commerce Clause legislation would have an insurmountable burden of proof in order to protect and exercise their proper roles in the constitutionally prescribed federalism system.

Such a burden is patently unfair as well as unconstitutional. The elected representatives within state and local government, not Congress, are most closely associated with and accountable for decisions affecting state and local services. State and local elected officials can more effectively evaluate conflicting intrastate concerns about delivery of services, the value of employees, the desirability of tax increases, etc., than can federal representatives. In fact, federal elected officials can use legislation to increase their electoral popularity with the security of knowing that blame for concomitant reductions in state and local services will not be attributed to them.

Clearly, absent an overriding federal interest, state and local prerogatives in such areas of concern deserve the pro-

[14]103 S.Ct. at 1064 n.17 ("Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration. . . .")

tection afforded by constitutional federalism. Should state and local compensation policies, for example, be perceived as undesirable to employees, those employees can seek new jobs within the private sector, where federal protection is properly accorded. On the other hand, if limited job markets operate to foreclose this option, it can be expected that dissatisfaction of employees will lead to poor performance, which in turn leads to complaints about service delivery for which the state and local elected officials will be held accountable. Therefore, the protection claimed to justify federal interference is intrinsic to state and local government without having to limit their prerogatives as to how best to utilize available resources. In any event, countervailing national interests, should they actually exist, can be accommodated through application of the balancing test.

National League of Cities and its progeny strike a proper balance between state and federal authority; where federal authority is necessary,[15] it is supreme. However, in some instances, the state and local interest is greater than the federal interest. *National League of Cities* assures the existence of a doctrine or rule of law that serves as a protection of state sovereignty in certain limited areas in which state and local governments can best advance the public interest.

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[15]"Undoubtedly the scope of this power [to regulate pursuant to the Commerce Clause] must be considered in light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

IV. A *NATIONAL LEAGUE OF CITIES* FEDERALISM CHALLENGE DEFEATS THE APPLICATION OF THE FAIR LABOR STANDARDS ACT TO LOCAL MASS TRANSIT OPERATIONS.

As was asserted in *amicus curiae's* brief filed prior to the original argument before the Court in the instant case,

> Simply stated, the FLSA coerces state and local governments into structuring employment practices in a manner that is harmful to the best interests of the overwhelming majority of the citizenry. Faced with increased costs, public transit systems must raise fares or decrease services. Raising fares makes the system less accessible to those who need it most, the poor; raising fares also decreases ridership and thereby lessens the overall benefits of transit operations. Reducing services at a time when increased services are demanded is obviously not in the public interest.[16]

This statement, and its supporting facts in *amicus curiae's* initial brief, demonstrate that the general concept of federalism, which embodies the principles of the Tenth Amendment, exists for an important reason, that is, citizens must be able to protect against shortsighted, unreasonable, arbitrary or merely unwanted interference by the federal government with essentially local concerns.

While there is an obvious interstate commerce impact where the continuity of a nationwide railroad system is interrupted,[17] the interstate commerce concern connected with the instant case, involving a purely local mass transit

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[16]Brief of *Amicus Curiae,* National Institute of Municipal Law Officers, at 13.

[17]*Long Island Railroad,* 455 U.S. 678.

system, is not only not obvious, but nonexistent; the only commerce and concerns affected are local.

National League of Cities has created difficulties of interpretation, but its result was correct. Because the circumstances of the decision represented an exception rather than the rule, the language of the opinion is relatively broad. The task of conclusively anticipating the perceived scope of the decision would have been formidable, at best. However, while clarification was inevitable, some clarification is found in subsequent related decisions of the Court, each of which has narrowed the potential scope of *National League of Cities* without abandoning its essentially correct premise. Therefore, the Court should not now abandon the difficult, but fundamental, duty of preserving the cooperative federalism system as established in the Constitution generally; instead, it should recognize the inherent propriety of *National League of Cities* and continue to refine, as carefully and patiently as possible, the constitutional structure intended by our forebears.

> From time to time it has seemed as if a balance of power in the federal system has been struck, as if the best possible safeguards of individual freedom had been devised. But always the balance has shifted, and further shifts are inevitable. The debate about power and the quality of freedom within the federal system will very likely continue for a long time to come. It is proper that it should. For, as Professor Mason has observed, "Distrust of power at all levels, of whatever orientation, is still the American watchword. Eternal vigilance is still the price of liberty . . . Jefferson declared that 'the jealousy of the subordinate governments is a precious reliance.' " A century and a half later, Louis D. Brandeis thanked "God for the limitations in-

herent in our federal system . . . Conflict between federal and state authority means 'vibrations of power,' and this, Hamilton said, is the 'genius of our government.' " As long as the federal system helps make these vibrations possible, free government in the United States is secure -- and so is federalism itself.[18]

CONCLUSION

Because application of the Fair Labor Standards Act, 29 U.S.C. §§201-219 (1976 & Supp. V 1981), to local mass transit operations is an essential local service which lies within the parameters of constitutional protection against undue federal intrusion upon state prerogatives as recognized, and properly so, in *National League of Cities,* the National Institute of Municipal Law Officers respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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[18]Leach, *supra* note 4, at 241-42 (quoting A.T. Mason, "Must We Continue the States Rights Debate?", 81 RUTGERS L. REV. 75 (Fall 1963)).

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Nos. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.,

Appellees.

On Appeals from the United States District Court for the Western District of Texas

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BRIEF FOR THE COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?

Whether the Tenth Amendment and constitutional principles of federalism bar the application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981), to publicly-owned mass transit systems?

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On Appeals from the United States District Court for the Western District of Texas

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BRIEF FOR THE COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE[1]

INTEREST OF AMICUS CURIAE

The Colorado Public Employees' Retirement Association is an organization formed in 1931 to administer the payment of retirement benefits to employees of the State of Colorado and its political subdivisions. The Associa-

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[1] This brief is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The written consents have been filed with the Clerk of the Court.

tion currently administers four separate retirement trust funds for state employees, school district employees, municipal employees, and judges. Employers and employees make equal contributions to these funds. The assets of these funds currently exceed $4 billion. Membership in the Association today consists of approximately 96,000 active employees and 24,000 retired persons and their beneficiaries. The policies of the Association are determined by a Board of Trustees consisting of fifteen persons, including the Colorado State Auditor, the Colorado State Treasurer, and thirteen Trustees elected by the Association's members.

The Colorado Public Employees' Retirement Association, interested in protecting the financial viability of the funds that it administers and promoting the general welfare of its members, has taken a keen interest in federal legislation and in constitutional law developments affecting state and local employees. In recent years, the Association has been particularly interested in proposed federal legislation that would subject its members to mandatory federal Social Security coverage. Since the members already fund and enjoy the benefits of the retirement programs operated by the Association, the application of mandatory Social Security coverage would provide them with overlapping coverage at substantial additional costs. If these costs were extended by mandatory Social Security coverage to all state and local employees, the Association's retirement funds and its members would face severe cost pressures that likely would necessitate a cutback in retirement benefits and possible elimination of the existing Association retirement program.

In an effort to preserve the integrity of the Association's retirement program, and to protect the Association itself from intrusive federal legislation, the Association has sought protection under the Constitutional guarantees of state and local sovereignty contained in the Tenth Amendment. These guarantees are embodied in this

Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and have been invoked in the Association's efforts to maintain the autonomy of its retirement programs.

This Court's possible reconsideration of its *National League of Cities* decision is a matter that commands the attention of the Colorado Public Employees' Retirement Association. At stake is a half-century's tradition in which the State of Colorado and the Association have possessed the independence to fashion appropriate retirement benefits for Colorado employees. A reconsideration of *National League of Cities* may raise legal and policy considerations that extend far beyond the narrow legal issue, initially briefed by the parties, of whether the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981), may be applied to publicly-owned mass transit systems. The Association accordingly wishes to participate in this case to assure that the historic, constitutional underpinnings of the *National League of Cities* decision remain intact and that state and local governments retain the authority to develop and administer their retirement programs—essential components of the compensation packages provided to state employees—free from unwarranted federal regulation.

SUMMARY OF ARGUMENT

I. The Colorado Public Employees' Retirement Association urges this Court to reaffirm the fundamental principles of the Tenth Amendment articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976). This landmark decision rests upon the unassailable constitutional principle that Congress may not regulate state activity in a manner that would "hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union v. Long Island Railroad*

Co., 455 U.S. 678, 687 (1982) (quoting *National League of Cities*, 426 U.S. at 851). While the precise contours of the immunity enjoyed by states and their political subdivisions under the Tenth Amendment are clouded, the Amendment, at its heart, must continue to be read as a guarantee that core sovereign state functions will be protected from unwarranted Congressional interference. The *National League of Cities* decision recognizes the vitality of the Tenth Amendment and its continued applicability to the sphere of federal-state relations. It is sensitive to the balance of interests that must be struck between sovereigns in our federal system and true to the framers' vision that states must be afforded a measure of freedom to operate their own governmental programs.

II. Although *National League of Cities* and its progeny contain sweeping pronouncements about the role of states in the federal system, the actual decision is a modest one that most recently was endorsed in *EEOC v. Wyoming*, 460 U.S. 226 (1983). When stripped of its broad constitutional overtones, *National League of Cities* holds only that Congress may not exercise its Commerce power to legislate the compensation paid to employees of states and their political subdivisions. Congressional intrusion into the amount of revenues that a state may allocate to its employees is a direct assault upon a state's ability to maintain its "separate and independent existence." Indeed, a state only may act through its employees. The instant case accordingly should not be used as a vehicle for reconsidering either the Constitutional foundations of *National League of Cities* or the test that has been developed for assessing claims of state immunity from federal Commerce Clause legislation. Regardless of the ultimate limits of Tenth Amendment immunity, this case may be decided narrowly by following the rule formulated in *National League of Cities* and *EEOC v. Wyoming* that the compensation paid to state employees, including public transit workers, may not be prescribed by Congress.

III. If this Court, however, should elect to review the prevailing test for assessing claims of state immunity from federal Commerce Clause legislation, then we would agree with the Appellant Secretary of Labor that some clarification of this test is appropriate. Once it is determined that Congressional legislation is directed at "States as States," a determination easily made from the text and legislative history of the law under review, then the next inquiry should be whether the legislation interferes with an integral state function that is an indisputable attribute of state sovereignty. This inquiry ought to be conducted through a functional, rather than an historical, analysis. The critical question is whether the function or service under review (1) is reasonably necessary to carry out the political task of governing a state or (2) concerns the provision of a public good that presently cannot be provided efficiently by private enterprise. If there is to be consistent application of constitutional doctrine, Congress' Commerce Clause powers cannot be dependent upon judicial resolution of the thorny historical question of whether some or all states were the first providers of a particular function or service. In this case, the provision of transit services, or more narrowly, the payment of compensation to public transit employees, is the sort of integral state function that should not be regulated by Congress. The decision of the court below accordingly should be affirmed.

ARGUMENT

I. THE *NATIONAL LEAGUE OF CITIES* DECISION IS FIRMLY GROUNDED ON CONSTITUTIONAL HISTORY AND LEGAL DOCTRINES THAT SHOULD NOT BE RECONSIDERED.

The decision of this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976) rests upon historical and constitutional foundations that do not require reexamination. In *National League of Cities*, this Court held that state and local governments should not be compelled to ac-

cept federal minimum wage and maximum hour standards because these laws would interfere with the fundamental right of the states to shape employment relations with their employees. In reaching this conclusion, this Court did not rely on the once common, but now thoroughly discredited, ploy of attempting to limit Congressional power by defining "interstate commerce" so narrowly that employment terms escape its reach. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Instead, *National League of Cities* focused directly upon the role of federal-state relationships in the maturing Union, and reaffirmed the principles of federalism that were central to the farmers' vision of the Republic. In holding that there are core sovereign state activities and functions which are beyond the reach of the federal hand, *National League of Cities* follows both constitutional history and two centuries of decisional law.

A. *National League of Cities* is Based on the Framers' Vision of State-Federal Relations.

National League of Cities, contrary to the view of Appellant Joe G. Garcia, is not an aberrational decision which subordinates federal powers to state sovereignty. Supplemental Brief of Appellant Garcia at 5-12. Rather, it reaffirms the notion, central to federalism, that the federal government is constitutionally incapable of interfering in " 'functions essential to [the] separate and independent existence' " of states. 426 U.S. at 845 (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)). There is no cause for this Court to accept Appellant Garcia's invitation to rewrite the constitutional history of federalism and abrogate the sovereign power of states to fashion their relationships with employees. The history of ratification of the Constitution and the Bill of Rights

clearly shows that the framers fully intended the states to have the freedom to perform essential governmental functions within their proper spheres of sovereignty.

During state debates on ratification of the Constitution, much opposition focused on the adequacy of the Constitution's protection of state autonomy. *See, e.g.*, Letter from Robert Yates and John Lansing to the Governor of New York, *reprinted in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480-483 (S. Elliott ed. 1836). The Constitution's defenders argued that such language was unnecessary, not undesirable. As Hamilton emphasized,

> . . . an attempt on the part of the national government to abridge [the states] in the exercise of [sovereignty] would be a violent assumption of power, unwarranted by any article or clause of its Constitution.
>
> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the U.S.

The Federalist No. 32, at 206-07 (A. Hamilton) (Cambridge ed. 1901).

Surely not even the most dogged denigrator of state government could for a moment contend that, in joining the Union, states granted to the national government paramount authority over state relations with their employees. Yet this extreme notion necessarily underlies the argument adopted by those who advocate a wholesale rejection of the *National League of Cities* decision.

The tone of Appellant Garcia's brief suggests that states are mere vestiges of an earlier government structure and that the framers would endorse this conception of the proper role of states in our federal system. Supplemental Brief of Appellant Garcia at 5-12. They would not. As Madison explained:

> [T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, foreign commerce . . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 303 (J. Madison) (Cambridge ed. 1901).

The framers certainly did not believe that the national government constitutionally could abridge the sovereign functions of the states.[2] This conclusion is "clearly admitted by the whole tenor of the instrument which contains the articles of the . . . Constitution." The Federalist No. 32, at 197 (A. Hamilton) (Cambridge ed. 1901). The first Congress deliberately emphasized the principle that the states did not cede all sovereign powers upon joining the Union by proposing the Tenth Amendment, which provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

---

[2] To the contrary, the greater fear was that the states would be too strong under the Constitution. *See, e.g.*, The Federalist Nos. 17 (A. Hamilton), 31 (A. Hamilton), 46 (J. Madison) (Cambridge eds. 1901). It was also argued that, in certain respects, the state governments would be strengthened by adoption of the Constitution. *See* The Federalist No. 21 (A. Hamilton) (Cambridge ed. 1901).

When the Amendment was considered by Congress, debate centered on whether the national government should be limited to powers "expressly" delegated to it. Madison successfully argued that Congress, and by extension the Union, would be impotent without also possessing powers implied from those delegated. 1 ANNALS OF CONG. 761 (1789). But neither he nor any other believed that such powers could be used to abrogate state existence. *See id.* at 436, 767-68.

Indeed, the Amendment was thought to have precisely the opposite effect. When ratification was debated by the states, no less a Federalist than John Adams argued that the Amendment was an "assurance that, if any law made by the federal government shall be extended beyond the power granted by the . . . Constitution, and inconsistent with the constitutions of [the] state[s], it will be an error, and adjudged by the courts of law to be void." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 131 (S. Elliott ed. 1836). Hence even passionate advocates of federal power believed the Amendment was a device for limiting federal overreaching and ensuring preservation of state autonomy.

As in debates over ratifying the Constitution, critics of the Tenth Amendment contended that explicit protection of state sovereignty was unnecessary. Such statements must be viewed in their context as one element of an argument that the Bill of Rights as a whole was unnecessary. That these were minority views is conclusively proved by the subsequent adoption of the Tenth Amendment and the other guarantees of the Bill of Rights.

History demonstrates the framers' fidelity to the ideas of states as largely independent sovereigns within the context of a federal union. Not for a moment did the framers believe or desire that the national government

could usurp state functions or drain state authority. That the states might not be free to structure the essential components of their employment relationships as they saw fit simply did not enter into the framers' calculus.

B. The *National League of Cities* Decision is Founded on Long-Standing Legal Precedent.

The principles of federalism underlying the Court's interpretation of the Tenth Amendment in *National League of Cities* are firmly rooted in a long line of decisions addressing the respective powers of states and the federal government. Federal powers, however broad, were initially recognized by the Court as limited to those delegated. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Subsequent decisions of this Court have demonstrated a concern transcending time and politics that state authority not be undercut. *See, e.g., Coyle v. Oklahoma*, 221 U.S. 559 (1911) (location of state capital is outside the scope of Congressional powers); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (Supreme Court will not review state court judgment that rests on adequate and independent state law grounds); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) ("Erie doctrine"). This Court's concern with the sovereign state functions protected by the Constitution was succinctly summarized in *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975), where the Court observed that "[t]he [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise powers in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *See generally Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1965 (1977).

With the possible exception of *Maryland v. Wirtz*, 392 U.S. 183 (1968), which *National League of Cities* overruled, this Court has never countenanced expansive federal intrusion into state affairs. It continuously has said that each state is "endowed with all the functions essential to separate and independent existence." *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). *Lane County* was decided in the middle of Reconstruction. It might have been reasonable, even natural, for this Court to respond to the trauma of civil war and rebirth of the Union by denying the existence of any independent authority in state governments. Remaining faithful to the framers' vision, the Court instead reiterated that states are indeed able to exercise a free hand in their proper spheres of activity.

Those spheres, of course, are not plenary; "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." *United States v. California*, 297 U.S. 175, 184 (1936). Consistent with this principle, the *National League of Cities* decision was not meant to outlaw federal power in areas of overwhelming national interest. 426 U.S. at 856 (Blackmun., J., concurring). Nor has it been interpreted to prohibit the national government from exercising its legitimate Commerce Clause powers to regulate interstate commerce. *See, e.g., FERC v. Mississippi*, 456 U.S. 742 (1982) (Public Utility Regulatory Policies Act held to be a legitimate use of the commerce power). What *National League of Cities* emphasizes is that, in order to protect the "indestructible union, composed of indestructible states," *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), "under most circumstances federal power to regulate commerce [may] not be exercised in such a manner as to undermine the role of the states in our federal system." *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 686 (1982).

This Court found the 1974 amendments to the Fair Labor Standards Act at issue in *National League of Cities* violative of just such a principle. Attempting to demarcate the bounds beyond which the federal government may not intrude, this Court recognized the severely limited power of Congress to regulate "functions essential to the separate and independent existence of the state," 426 U.S. at 851, and "undoubted attribute[s] of state sovereignty." 426 U.S. at 845.

The outer boundaries of this protected turf may be elusive. But whatever this protected area may be, the only way a state can act within it is through its employees. The federal hand must be stayed from undue interference with state employer-employee relationships, else it will act upon the very heart of *all* sovereign functions of the state. To decide otherwise, and to reject the historical and doctrinal underpinnings of *National League of Cities*, as urged by Appellant Garcia, would indeed be to permit "the National Government [to] devour the essentials of state sovereignty. . . ." *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

C. The Doctrine of Intergovernmental Tax Immunities Reaffirms the Principles of State Sovereignty Endorsed in *National League of Cities*.

Concern with federalism, and the relative autonomy of the state employer-employee relationship, is not expressed only in the context of the Tenth Amendment. One of its earliest manifestations is the doctrine of intergovernmental tax immunities. Since the early nineteenth century, this Court has recognized that the federal scheme embodied in the Constitution implicitly limits the power of a state or the federal government to tax the other or its instrumentalities. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). This necessary consequence of the

separate sovereignties of states and the national government arises because, as Chief Justice Marshall stated, "the power to tax involves the power to destroy." *Id.* at 431. Taxation implies interference and the establishment of governmental priorities, neither of which one level of government may do for another. As such, each level of government is immune from taxation by the other. *See South Carolina v. Regan*, —— U.S. ——, 104 S. Ct. 1107 (1984); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 157-58 (1911); *Ambrosini v. United States*, 187 U.S. 1 (1902); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 585-86 (1895); *United States v. Railroad Co.*, 84 U.S. (17 Wall.) 322 (1873); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).

To be sure, the perimeter of this doctrine has varied over the years as a necessary accompaniment to other developments in the law. But examination of this evolution conclusively proves that Appellant Garcia errs in asserting that the doctrine, and the support it provides for this Court's decision in *National League of Cities*, is largely vestigial. Supplemental Brief of Appellant Garcia at 22-30.

This Court first extended intergovernmental immunity to the states in a seminal holding that the taxing power of the federal government necessarily is restricted when used to tax state instrumentalities. *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).[3] A half-century later, this

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[3] Writing for the Court, Justice Nelson relied upon the principles adumbrated in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), as well as the "familiar rule(s)" of federalism:

> [I]n many articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized . . . . Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution . . . it would seem to follow as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserv-

principle was reaffirmed in *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926). While exempting independent contractors of state governments from the general extension of state immunity from federal tax, this Court in *Mitchell* emphasized that "those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other." *Id.* at 522.

Subsequent decisions have not eroded the basic tenet that federal taxation power may not debilitate state sovereignty. *New York v. United States*, 326 U.S. 572 (1946) is the only case that at first blush seems to reject the intergovernmental tax immunity doctrine, but even a cursory analysis indicates that *New York* does not abandon it. That case drew four opinions from the eight Justices who took part in it. Although six Justices agreed that the State of New York was not exempt from a federal tax on sales of bottled water, "all agree[d] that not all of the former [tax] immunity is gone." *Id.* at 584. (Rutledge, J., concurring). Even Justice Frankfurter's opinion, which was the most disparaging of the immunity doctrine, had no quarrel with limiting the doctrine to matters more relevant to the task of governing; what he objected to was its extension to such "irrelevancies" as bottled water. *Id.* at 581.[4]..

> ing their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.

Collector v. Day, 78 U.S. (11 Wall.) 113, 125-26 (1871).

[4] Justice Stone's concurrence, which, joined by three Justices, attracted the most support, specifically limited the holding of the case before it. He stressed that the Court was

> . . . not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike . . . .

Admittedly, the scope of the intergovernmental tax immunity doctrine has been narrowed over the years. State employees are no longer exempt from federal income tax. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871). Similarly, many state-operated activities unrelated or only tangentially related to the task of governing are now subject to federal law. *See, e.g., Massachusetts v. United States*, 435 U.S. 444 (1978) (user fees); *United States v. California*, 297 U.S. 175 (1936) (railroads). Such changes do not, however, transform this vital doctrine into a lifeless one.

This Court resolutely has refused all opportunities to declare the doctrine no longer valid. *Massachusetts v. United States*, 435 U.S. 444, 454 (1978); *Fry v. United States*, 421 U.S. 542 (1975). This doctrine offers useful parallels to the question of the validity of federal preemption of state employee compensation policies, particularly when few such policies could be such an essential attribute of a state's sovereignty as the wages paid to the state's employees. Like the Tenth Amendment limitations on federal interference in state employment relationships, the intergovernmental tax immunity doctrine is a method of preserving state sovereignty over matters peculiarly the preserve of an autonomous governmental body. The doctrine stands as a firm constitutional basis for this Court's decision in *National League of Cities* and its recognition of the autonomy conferred upon states.

> It is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State . . . [t]he tax, even though non-discriminatory, may be regarded as infringing [state] sovereignty. (citation omitted)

New York v. United States, 326 U.S. 572, 586-87 (1945). Indeed, when combined with Justices Douglas and Black's vigorous dissent supporting complete state independence from federal taxation, *New York* provides a solid majority behind the intergovernmental tax immunity doctrine.

II. THE *NATIONAL LEAGUE OF CITIES* DECISION SHOULD BE REAFFIRMED AT LEAST INSOFAR AS IT RESOLVES THE NARROW ISSUE OF WHETHER FEDERAL LEGISLATION MAY PRESCRIBE THE COMPENSATION TO BE PAID STATE EMPLOYEES.

The Colorado Public Employees' Retirement Association respectfully submits that this case does not present an appropriate factual setting for defining the precise contours of the Tenth Amendment immunity enjoyed by states and their political subdivisions. In its recent decisions in *EEOC v. Wyoming*, 460 U.S. 226 (1983), *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982), *FERC v. Mississippi*, 456 U.S. 742 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), this Court already has signalled that its earlier decision in *National League of Cities* cannot be read to afford states and municipalities a broad shield under the Tenth Amendment from all forms of federal legislation that may affect their governmental activities. Although these decisions suggest that the scope of its protection may be limited, the Tenth Amendment has not been read out of the Constitution.

The terms of the Tenth Amendment guarantee that States will remain free to enjoy the essential attributes of their sovereignty. The *National League of Cities* decision dealt directly with only one of these attributes: the right to determine the compensation paid to its employees and fix the hours that will be worked by its employees. In language of limited applicability to most other cases implicating the Tenth Amendment, the Court reasoned that:

> One undoubted attribute of state sovereignty is the States' *power to determine the wages* which shall be paid to those whom they employ in order to carry out their governmental functions, *what hours those persons will work, and what compensation will be*

> *provided where these employees may be called upon to work overtime.* The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence," [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them. (emphasis added)

426 U.S. at 845-46.

The decision in *National League of Cities*, if read most narrowly, stands for the modest proposition that the compensation paid by a state to its employees cannot be determined by Congressional legislation. Congress thus cannot fix the compensation to be paid *any* state employees, be they public transit workers, elected officials, or the administrative personnel who staff state agencies. The "power to determine the wages . . . hours and compensation" is a "function" that the Court in *National League of Cities* found to be "essential to [the] separate and independent existence" of states. "Congress may not abrogate the States' otherwise plenary authority to "exercise this power. 426 U.S. at 846.

This limited reading of the *National League of Cities* decision was endorsed in this Court's recent decision in *EEOC v. Wyoming*, 460 U.S. 226 (1983). There this Court held that federally imposed state compliance with the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), was not violative of Wyoming's Tenth Amendment rights. In reaching this decision, the Court carefully distinguished, and reaffirmed, its earlier holding in *National League of Cities.* Writing for the Court, Justice Brennan stated:

> A State's employment relationship with its workers can, under certain circumstances, be one vehicle for the exercise of its core sovereign functions. In *National League of Cities*, for example, the power to determine the wages of government workers was

> tied, among other things, to the exercise of the States' public welfare interest in providing jobs to persons who would otherwise be unemployed, 426 U.S. at 848. Moreover, *some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment.* See *id.*, at 850 (relating power to determine hours of government workers to unimpeded exercise of State's role as provider of emergency services). See generally *id.*, at 851 (stressing importance of state autonomy as to "*those* fundamental employment decisions *upon which their systems for performance of* [their dual functions of administering the public law and furnishing public services] *must rest*"). (emphasis added)

460 U.S. at 238 n. 11.

The right to fix the compensation paid to state employees was recognized in the majority opinion to be one of the "fundamental employment decisions" needed for the state to exercise its "core sovereign functions." This same view would appear to be shared by the four Justices who dissented from the majority opinion. The dissent found that Congress lacked the power to "dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees" and therefore could not apply the Age Discrimination in Employment Act to the states. 460 U.S. at 251 (Burger, C.J., dissenting). Consequently, in the Court's most recent interpretation of the protections given states by the Tenth Amendment, all of the members of the Court appeared to endorse the narrow proposition, advocated here by the Colorado Public Employees' Retirement Association, that Congress may not intrude into state sovereignty by dictating the compensation to be paid to state employees.

The same concerns that were highlighted by the Court in *EEOC v. Wyoming* and used to distinguish the earlier *National League of Cities* decision are before the Court

again in the instant appeal. The Court in *EEOC v. Wyoming* reasoned that federal preemption of the Wyoming statute specifying the retirement age for game wardens raised a completely different set of sovereign concerns from those presented in *National League of Cities*. There "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 460 U.S. at 240. Two "consequential effects" were identified as being not present in *EEOC v. Wyoming*, but present in *National League of Cities*. Both are present here. First, in both *National League of Cities* and in this case, states are being forced to abide by wage and overtime restrictions that may leave them with less managerial flexibility and less money for other vital state programs. Although the record here indicates that transit workers, as a group, receive wages in excess of the federal minimum wage,[5] there may be particular jurisdictions which wish to preserve the option of compensating their transit employees at less than the prevailing federal minimum wage should economic conditions and other compelling local needs doctate a change in compensation policy. Even though public transit workers, because of their relatively high hourly wages, will rarely, if ever, be directly affected by any minimum wage requirement, they surely will be affected by application of the overtime provisions of the Fair Labor Standards Act. These requirements would intrude unduly upon the powers of state and local governments to choose how to structure routes, employee work hours, service schedules, record keeping and aggregate employee compensation. The loss of freedom to allocate resources such as the compensation paid public employees, including public transit employees,

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[5] *See, e.g.*, U.S. DEPARTMENT OF LABOR, UNION WAGES AND BENEFITS: LOCAL TRANSIT OPERATING EMPLOYEES, Table 2 at 4 (1981). *See also* AMALGATED TRANSIT UNION, RESEARCH DEPARTMENT BULLETIN 5 (Nov. 1983).

when necessary to fund other vital state programs is precisely the sort of encroachment upon state sovereignty that was repudiated in both *National League of Cities* and *EEOC v. Wyoming*.

Second, in both *National League of Cities* and in this case, the States wished to preserve their "ability to use their employment relationship with their citizens as a tool for pursuing social and economic policies beyond their immediate social and goals. See, *e.g.*, 426 U.S., at 848 (offering jobs at below the minimum wage to persons who do not possess minimum employment requirements')." *EEOC v. Wyoming*, 460 U.S. at 242. Regardless of whether transit employees are paid in excess of the minimum wage, states and their political subdivisions, from time to time, may need to respond to local economic crises by offering to employ their citizens at less than the federal minimum wage. Whether acting as the employer of last resort to ameliorate the hardships of unemployment or simply choosing the legitimate policy goal of maximizing employment, states should not be encumbered by the Fair Labor Standards Act in their ability to fashion employment policies.[6]

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[6] It should be remembered that the *National League of Cities* decision analyzed only federal Commerce Clause legislation. *National League of Cities* expressly left open the question "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power . . . or § 5 of the Fourteenth Amendment." National League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976). The Court has reaffirmed in recent cases that "when properly exercising its power under the § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983). *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287 n.28 (1981); City of Rome v. United States, 446 U.S. 156, 179 (1980). However, the federal minimum wage and maximum hour legislation at issue in this case cannot be jusitfied as an exercise of these other constitutional powers.

The authority to fix the wages paid to state employees, whether they are employed as transit workers or in some other capacity, is both an essential attribute of state sovereignty and an integral state function that may not be regulated by Congress. The weighty Tenth Amendment and federalism issues that have been attached to this case can be reserved for decision at a later time. The only question that truly must be resolved now is the limited one of whether *National League of Cities* should be reaffirmed insofar as it holds that Congress may not use its Commerce Clause powers to prescribe the compensation paid to state employees. The answer to this narrow question is "yes."[7]

III. THE PAYMENT OF COMPENSATION TO PUBLIC TRANSPORTATION WORKERS IS A CORE SOVEREIGN STATE FUNCTION THAT MAY NOT BE REGULATED BY CONGRESS.

The Colorado Public Employees' Retirement Association endorses the argument, fully articulated by Appellees San Antonio Metropolitan Transit Authority and The American Public Transit Association, that the provision of publicly-owned local mass transit is a state and local

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[7] The Colorado Public Employees' Retiremert Association numbers among its members thousands of employees who are engaged in occupations specifically identified in *National League of Cities* as integral operations in areas of traditional governmental functions: fire and police protection, sanitation, parks and recreation, public health, schools and hospitals. National League of Cities v. Usery, 426 U.S. 833, 851 (1976). The immunity of these employees from Congressional attempts to regulate compensation should continue, even if this Court should find that some characteristics of the public transportation field make it appropriate to subject workers in this field to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981). Consequently, the vitality of the *National League of Cities* decision should be preserved at least insofar as these occupations are concerned, regardless of whether the Tenth Amendment and constitutional principles of federalism might permit the application of the minimum wage and overtime provisions of the Act to publicly-owned mass transit systems.

governmental function that is integral to the sovereign responsibilities of states and their political subdivisions. It is among the types of activities that the *National League of Cities* decision sought to shield from the application of the Fair Labor Standards Act. The Colorado Public Employees' Retirement Association does not wish to repeat this argument. Rather, the Association additionally argues that the provision of compensation to public employees—apart from the particular services performed by these employees—ought to be classified as the sort of state governmental "function" that survives judicial scrutiny under the test formulated by this Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). There the rule of *National League of Cities* was summarized as follows:

> [I]n order to succeed, a claim that Congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.* at 845. Third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

452 U.S. at 287-88.

There also is a general balancing analyis to be conducted in cases where these three requirements are met. Commerce power legislation still may be applied to regulate state activities if justified by compelling federal interests that outweigh the interests of states. 452 U.S. at 288 n.29. The *Hodel* formulation of the *National League of Cities* holding has been endorsed and applied in recent decisions of this Court. *See EEOC v. Wyoming*, 460 U.S. 226, 237-39 (1983); *United Transportation Union v.*

Long Island Railroad Co., 455 U.S. 678, 684 and n.9 (1982).

The Appellant Secretary of Labor, in his Supplemental Brief, argues that some clarification of the *Hodel* test may be appropriate. Supplemental Brief of Appellant Secretary of Labor at 2, 11. The Colorado Public Employees' Retirement Association disputes the need in this case to undertake an extensive analysis of this test because the compensation paid to state employees plainly is a core sovereign function beyond the reach of Commerce power legislation. However, the Association agrees that if this test is applied, it should be clarified—though not in the manner suggested by the Secretary.

Our principal point of disagreement with the Secretary is over the interpretation of the third prong of this test: whether states' compliance with the federal law "would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (quoting *National League of Cities*, 426 U.S. at 852). The Secretary argues that this prong of the test should involve an analysis of whether the particular activity being regulated *historically* has been performed by the state. We instead argue that the Court should adopt a functional, rather than an historical, analysis which focuses upon the relationship between the particular function at issue and the political task of governing.

The first prong of the *Hodel* test specifies that only the federal regulation of "States as States" is prohibited by the federal government. This encompasses activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), but reserves as appropriate targets of federal legislation all conduct by private parties affecting inter-

state commerce. *See, e.g., United States v. Darby*, 312 U.S. 100 (1941).[8]

The first prong of the *Hodel* test is relatively uncontroversial and easily applied. It recognizes that only state, and not private, conduct enjoys protection under the Tenth Amendment. In this case, there is no dispute that the first prong is satisfied because the Fair Labor Standards Act, 29 U.S.C. §§ 201-210 (1976 & Supp. V 1981), by its express terms, would regulate the wages paid by States to their own employees, including public transportation employees.[9]

The second prong of the *Hodel* test, that the federal statute must address matters that are indisputably attributes of state sovereignty, is more problematic than the first. At least at first blush, this requirement appears to overlap with the third prong of the test, which requires that the federal regulation impair the state's ability to structure integral operations in areas of traditional state functions. The Colorado Public Employees' Retirement Association agrees with the Secretary that the inquiry suggested by the second prong is largely subsumed within the inquiry to be taken under the third prong of the *Hodel* test. Supplemental Brief of the Appellant Secretary of Labor at 12-13. It is difficult to imagine federal

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[8] Federal power to preempt state laws regulating private commerce is well established under the Supremacy Clause of the Constitution and not contested by the parties. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); Hines v. Davidowitz, 312 U.S. 52 (1941).

[9] The immunity of the states has been limited by this Court and lower courts when the state is acting as a market participant. *See, e.g.*, New York v. United States, 326 U.S. 572 (1946) (selling bottled water as a market participant is not a sovereign activity that invokes the protection of the intergovernmental tax immunities doctrine); Public Service Co. v. FERC, 587 F.2d 716 (5th Cir. 1979) (state production of oil and gas is not protected by immunity from federal regulation). While this consideration is not present in the instant case, the distinction made between "states as states" and "states as market participants" is an indication of the relatively narrow scope of the *National League of Cities* decision.

legislation that could interfere with the integral or traditional operation of state functions, yet *not* regulate an indispensable attribute of state sovereignty. Conversely, any legislation that regulates a matter that is an indisputable attribute of state sovereignty necessarily must interfere with an integral state function. The Colorado Public Employees' Retirement Association accordingly suggests that no violence would be done to the holding and constitutional origins of *National League of Cities* if the second and third prongs of the *Hodel* test were merged.

The third prong of the *Hodel* test, whether standing alone or merged with the second prong, is at once the most enigmatic and the most important. This requirement has been interpreted in a variety of ways, none of which is completely satisfactory.

The Secretary and others have argued that the cryptic phrase—"integral operations in areas of traditional governmental functions"—should be read to mean that there are certain *historical* functions that states may not regulate with a free hand because they were not first on the scene. *See, e.g.*, Supplemental Brief of the Appellant Secretary of Labor at 17-23; Alfange, *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 S. Ct. Rev. 215. This historical approach already has been rejected by this Court in *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982), where it wrote that its emphasis in *National League of Cities*

> on traditional governmental functions and traditional aspects of state sovereignty [was] not meant to impose a static historical view of state functions generally immune from federal regulation.

455 U.S. at 686-87.

Any form of historical, or "who got there first," approach is likely to result in chaos when courts are confronted with the immunity claims of states that have different histories of providing particular services or

performing particular functions. A service provided first in one state may have been provided first by a private party in another state. No single judicial application of this historic test could apply uniformly to all states. Rather, courts would be required to analyze each state function within the context of each state's unique political history. This arbitrary approach, moreover, would freeze our federal system in the structures of the past and leave little room for the states to serve as "laborator[ies]" for the dynamic exploration of new governing techniques. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. State*, 447 U.S. 429, 441 (1980); Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity From Commerce Clause Regulation*, ARIZ. ST. L.J. 35, 73-75 (1977).[10]

The Colorado Public Employees' Retirement Association submits that the determination of whether federal legislation violates the Tenth Amendment should depend upon the function under review and the relationship of that function to the political task of governing.[11] Func-

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[10] What is an integral state function must be viewed in terms of the evolving role that states play to improve the welfare of their citizens. As Justice Black remarked in his concurring opinion in Helvering v. Gerhardt, 304 U.S. 405, 427 (1938):

> [T]here cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental . . . [T]he people—acting . . . through their elected representatives—have the power to determine as conditions demand, what services the public welfare requires.

See also Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978); Sailors v. Board of Education, 387 U.S. 105, 110-11 (1967). State and local governments should not lose their constitutional immunities when they must alter their activities to meet the changing needs of their citizens.

[11] The adoption of a functional, rather than an historical approach, for assessing state claims of immunity from federal legisla-

tions that concern the provision of a public good that cannot be provided efficiently by private enterprise, under this test, would be integral to the task of governing and beyond the reach of Congress' Commerce Clause legislation.

The Sixth Circuit Court of Appeals' decision in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (1979), formulated a test for determining the presence of an "integral state function" akin to the test suggested here. The *Amersbach* test lists four criteria to be reviewed for deciding whether the state government should be immune from federal regulation:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense;
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> (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain;
>
> (3) government is the principal provider of the service or activity; and
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> (4) government is particularly suited to provide the service or perform the activities because of a communitywide need for the service or activity.

598 F.2d at 1037.[12]

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tion seems to be countenanced by this Court's decision in *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983), which states:

> The principle of immunity articulated in *National League of Cities* is a *functional* doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which states enjoy a "separate and independent existence," not be lost through undue federal interference in certain core state functions. (emphasis added)

[12] At least two other courts have adopted the *Amersbach* test and its functional analysis. *See* Molina-Estrada v. Puerto Rico Highway

One important feature of this test—not present in an historic test—is that it applies to state functions, such as the payment of compensation to state employees, as well as to state services, such as mass transit services. Both the *Ambersbach* test and the more abbreviated version of this test proffered here—whether the function or service is integral to the political task of governing—would assure greater predictability in the affairs of individual states. Under an "historic" test, a court or a state cannot determine which areas of regulation may be preempted by federal legislation unless it surveys the historic experience of forty-nine other states. By contrast, the *Amersbach* formulation provides states with a much higher degree of certainty about the fields of regulation they may enter free from federal interference. Greater certainty, of course, would lessen the frequency of conflicts betwen state and federal laws and reduce the litigation burdens on courts asked to decide state immunity claims.

The suggested modification of the *Hodel* test proposed here is supported by the Court's opinions in *National League of Cities* and *Long Island Railroad.* The Court has observed that the "emphasis on traditional government functions and traditional aspects of state sovereignty" in *National League of Cities* was "meant to require an inquiry into whether federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 686-87 (1982) (quoting *National League of Cities*, 426 U.S. at 851). The Court's focus upon "basic state prerogatives" encompasses more than simply the various types of activities historically

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Authority, 680 F.2d 841 (1st Cir. 1982); Woods v. Holmes & Structures of Pittsburg, Kansas, Inc., 489 F.Supp. 1296 (D. Kan. 1980).

undertaken by a state government. It also necessarily includes the functions and relationships, such as the employer-employee relationship, that are pieces of the machinery which run state governments. Both the machinery of state government and the activities which are driven by this machinery are in need of, and deserve, protection from overreaching federal interference. A narrow historical approach, such as that advocated by the Secretary, focusing only upon the historical origins of particular activities, would not guarantee the needed protection.[13]

If the right to fix the compensation paid to state employees is viewed as the "integral state function" that is to be scrutinized under the *Hodel* test, (whether applied in its original formula or as modified in the manner suggested above), the provisions of the Fair Labor Standards Act at issue here plainly cannot pass constitutional muster. States cannot effectively manage their

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[13] The decision in United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982) does not intimate either that only "activities" and not "relationships," such as that between employer and employee, fall under the umbrella of protection afforded by the Tenth Amendment, or that Congress is free to regulate the compensation paid by a state to some classes of its employees. The Court explained that in *National League of Cities* it "held that Congress could not impose the requirements of the Fair Labor Standards Act on state and local governments." United Transportation Union v. Long Island Railroad Co., 455 U.S. at 683. This statement of the holding in *National League of Cities* does not distinguish between public transit workers and other types of state employees or suggest that Congress may prescribe the compensation of some state employees but not others. Rather, the *Long Island Railroad* decision dealt only with the narrow issue of whether the collective bargaining provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1976) may be applied to state-owned passenger railroads. In a narraw holding that addressed the unique characteristics of the federal rail system, the Court emphasized the paramount federal role in fashioning "a uniform regulatory scheme" for the national rail system and the need for "federal regulation of railroad labor relations . . . to prevent disruption in vital rail service essential to the national economy." 455 U.S. at 688.

workforce, the agents through which they act, unless they are free to decide how much their employees, individually and collectively, are to be paid and what hours they are to work. Few relationships are so integral to the task of governing a state as that between the state and its employees; and few aspects of this relationship are more fundamental than the wages to be paid from employer to employee and the hours of service expected of the employee. The ability of states to act through their employees, to allocate their resources to personnel and programs, and to attain employment and welfare goals are all inextricably bound up with the freedom of states to fix compensation for their employees. No countervailing federal interest can justify Congressional intrusion into this sphere of legitimate state authority.

CONCLUSION

This Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) is true to the vision of federalism embraced by the framers of the Constitution and embodied in numerous decisions handed down by this Court. Its limited holding, that Congress may not exercise its Commerce Clause power to prescribe the compensation to be paid state employees, is correct and requires affirmance of the decision below.

Respectfuly submitted,

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Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

JOE G. GARCIA,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

On Appeals from the United States District Court for the Western District of Texas

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SUPPLEMENTAL BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION ON REARGUMENT

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QUESTIONS PRESENTED

"In addition to the questions presented . . . previously briefed and argued, the parties are requested to brief and argue the following question:

Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered."

Order of the Supreme Court of the United States, 52 U.S.L.W. 3937 (U.S. July 5, 1984).

The questions previously briefed and argued are:

1. *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore constitutionally cannot be applied to integral activities in areas of traditional governmental functions. Are publicly owned local mass transit services integral activities in areas of traditional governmental functions, thus precluding the application of these federal statutory provisions to them?

2. Did *National League of Cities* find unconstitutional so much of Congress' intended coverage of state and local governmental functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unwarranted to apply these requirements to publicly owned local mass transit systems without new congressional enactment?

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W. Wilson, *Constitutional Government in the United States* (1911) 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 82-1951 and 82-1913

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

JOE G. GARCIA,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

On Appeals from the United States District Court for the Western District of Texas

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SUPPLEMENTAL BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION ON REARGUMENT

SUMMARY OF ARGUMENT

This Court should reaffirm the principles of the Tenth Amendment set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and the federalism values reflected therein. The United States does not claim that its Commerce Clause power is unconstrained by principles of federalism and the Tenth Amendment when it seeks to regulate directly state and local governments, nor does it claim that determinations by state and local govern-

ments of wages and overtime compensation for their employees is not a protected "core state function." Thus, the only effective difference between the federal appellant's position and that of appellees is whether such constitutional protection embraces state and local governments engaged in providing local publicly owned mass transit services.

The court below correctly held that the United States Secretary of Labor may not require the San Antonio Metropolitan Transit Authority ("SAMTA"), a political subdivision of the State of Texas, to alter its wage and overtime compensation policies to conform to the requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982) ("FLSA"). This conclusion was required by developments in Commerce Clause and federalism jurisprudence, *National League of Cities*, and four subsequent decisions of this Court. These five cases, as well as previous decisions, recognize two constraints on Congress' exercise of Commerce Clause power in the direct regulation of the States and their political subdivisions: (1) the principles of federalism embodied in the constitutional structure, 426 U.S. at 842, 849, 851-52, 854; and (2) the Tenth Amendment, *id.* at 842. These constitutional limitations invalidate Congress' extension of the FLSA wage and overtime provisions to the operations of state and local governments engaged in delivering traditional public services. This Court has several times concluded that the States' ability to determine the wages and hours of their employees is a core function of state and local governments that Congress, in the otherwise proper exercise of its commerce powers, cannot impair. *See infra* at 36-42.

That federalism principles restrain the exercise of certain of Congress' plenary powers set forth in Article I, Section 8 of the Constitution of the United States, has been an important part of this Court's federalism jurisprudence from *Collector v. Day*, 78 U.S. (11 Wall.) 113

(1871), to *EEOC v. Wyoming*, 103 S. Ct. 1054, 1062 (1983). The deviation from these principles in *Maryland v. Wirtz*, 392 U.S. 183 (1968), was soon recognized as such and specifically reversed within eight years after the decision.

Four decisions of this Court after *National League of Cities* reconsidered, refined, and clarified the principles articulated therein.[1] It is now established that Congress has virtually unlimited commerce power to regulate private persons within the States and thereby preempt, pursuant to the Supremacy Clause, inconsistent state regulation of such persons. But at least eight Justices of this Court, including three of the four who dissented in *National League of Cities*, also have recognized the requisite corollary of Congress' extension of commerce regulation to purely local activities: Congress may not regulate directly the internal operations of States as States in ways that impair their capacity to function effectively in the federal system. For, if Congress can regulate the States, including their political subdivisions, in ways that "hamper" their core governmental capacity to deliver the public services their citizens require, deem essential, and pay taxes to fund, the States then will be unable "to fulfill [their] role in the Union." *LIRR*, 455 U.S. at 687. The standard of immunity that has evolved from *National League of Cities* and subsequent decisions is a relatively narrow one, but it is firmly rooted in the structure of the Constitution, fully supported by the debates of the framers, at harmony with the substantial body of this Court's federalism jurisprudence, and essential to the practical preservation of democratic federalism today. It is a standard upon which state and local governments have relied in structuring the delivery of essential governmental services.

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[1] *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982) ("*LIRR*"); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).

The Solicitor General concurs. He nevertheless attempts to limit the federalism protection of state and local governments in ways that exclude local public mass transit services even though he does not deny that today such services are pervasively rendered by state and local governments; his theories, however, are inconsistent with the principles articulated in *National League of Cities*. In *LIRR*, this Court interpreted those principles and rejected a "static historical view" such as that proposed by the Solicitor General in limiting federalism immunity, 455 U.S. at 686. *See* Brief for the American Public Transit Association ("APTA") (October Term, 1983) ("APTA Br.") 22-25. The Solicitor General's suggestion that the crucial inquiry is whether the States provided the service before enactment of the federal regulatory legislation is unrelated to the constitutional principles at stake and is an unworkable doctrine. But, in any event, this test is satisfied here since state and local governments pervasively provided local public transit services before Congress sought to impose intrusive FLSA requirements on transit operators—public or private. *See* APTA Br. 23-24; 27-35. Also, contrary to the Solicitor General's position on the relevance of federal mass transit assistance, this Court, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), held that the acceptance of federal grants does not subject the States to implicit conditions not authorized in the funding statute. *See also Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 27 (1982); APTA Br. 35-45.

Appellant Garcia seeks to limit the federalism protections accorded the States through application of four fundamental misperceptions. In reality, contrary to Garcia's contention, the framers of the Constitution were concerned that Congress, in the exercise of its delegated powers, should not impair the States' capacity to meet their local responsibilities, and an important purpose of the Tenth Amendment was to protect the States from such

federal impairment. *See infra* at 25-32. Second, the framers intended that the judiciary should arbitrate issues of federalism, and from its inception the Court readily accepted its umpire role, confirming that "in many articles of the Constitution . . . the independent authority of the States, is distinctly recognized." *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). *See infra* at 41-42. Third, the federalism protection applies to the States as providers of traditional public services, which are not of a lesser constitutional status than the making and enforcement of laws. The provision of essential governmental services, which include police and fire protection as well as public education and transit, is a fundamental part of the local public health, safety and welfare responsibilities that the Constitution presumes the States will retain the unimpaired capacity to administer. *See infra* at 42-48. Finally, the States' decision not to provide some police, transit, park, or health services directly but rather through regional authorities or local governments which the States have created to perform such governmental functions, does not provide any constitutional basis for excluding political subdivisions of the States from this constitutional protection. *See infra* at 35-36.

The limits of constitutional federalism and the Tenth Amendment on Congress' commerce power to regulate state and local governments directly, as articulated in *National League of Cities* and four subsequent cases, should again be reaffirmed. This case falls squarely within those principles. This Court has held and repeatedly confirmed that application of the FLSA wage and overtime compensation provisions to state and local governments is regulation of the States as States, and impairs an essential attribute of state sovereignty. APTA Br. 7, 13. It also has held that local political subdivisions and cities are embraced in this protection. 426 U.S. at 833 n.20; *see infra* at 35-36. Local public mass transit

services—which are provided pervasively by state and local governments [2] at substantial cost to their taxpayers to meet community-wide needs that cannot be met by the private sector—are as traditional, as required, and as essential as the public services identified in *National League of Cities*. APTA Br. 15-22.

ARGUMENT

IN *NATIONAL LEAGUE OF CITIES* AND SUBSEQUENT DECISIONS, THIS COURT AGAIN HAS RECOGNIZED AND PROPERLY APPLIED TWO CONSTITUTIONAL LIMITATIONS ON THE EXERCISE OF THE COMMERCE POWER OVER STATE AND LOCAL GOVERNMENTS: PRINCIPLES OF CONSTITUTIONAL FEDERALISM AND THE TENTH AMENDMENT.

Fry v. United States, 421 U.S. 542, 547 n.7 (1975), reaffirms "the constitutional policy that Congress may not exercise [its commerce] power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." That longstanding constitutional principle again was applied in *National League of Cities* to prohibit Congress' exercise of its Commerce Clause authority in ways that would impair "core state functions," *EEOC*, 103 S. Ct. at 1060, and thereby endanger the States' "separate and independent existence." 426 U.S. at 845, 851. Congress therefore could not "displace the States' abilities to structure employer-employee relationships" in the performance of such traditional governmental responsibilities as "administering the public law

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[2] State and local governments provide at least 94 percent of all local mass transit passenger trips. APTA, *Transit Fact Book* 43 (1981). Virtually all of the large cities provide public transit services. APTA Br. 24. Of the fourteen large cities with private systems as of 1960, noted in the Solicitor General's brief last Term ("U.S. Br.") at 17, all are now publicly owned. U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 2-7 (1981).

and furnishing public services." *Id.* at 851 (emphasis added). "This exercise of congressional authority," the Court held, "does not comport with the federal system of government embodied in the Constitution," *id.* at 852, in which a discrete and separate role for the States is recognized and preserved in the structure of the Constitution and the Tenth Amendment,[3] *id.* at 842, 849, 851-52, 854. As this Court's doctrine of Commerce Clause power evolved in response to Congress' expanding exercise of it, the principles of federalism applied in *National League of Cities*, and refined in subsequent decisions, have become "sound and enduring constitutional doctrine."[4]

I. THIS COURT HAS DEVELOPED AN EXACTING BUT PRACTICAL TEST THAT PROPERLY RESPECTS COMPETING CONSTITUTIONAL VALUES.

National League of Cities has become a working part of our constitutional law. On four occasions since 1976, this Court has reaffirmed the principles of the Tenth Amendment and clarified the boundaries of constitutional federalism as limitations on the exercise of the commerce power as set forth in *National League of Cities*. What has developed is a useful doctrine protective of competing federal and state interests.

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[3] *See, e.g.*, Justice Brennan for the Court in *EEOC*, 103 S. Ct. at 1064 n.18 (noting "Tenth Amendment constraints . . . circumscribe the exercise of [Congress'] Commerce Clause powers"); *id.* at 1069 (Burger, C.J., dissenting) ("Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment"); *id.* at 1078 (Powell, J., dissenting) (federalism limitation was "implicit in the Constitution as originally ratified"); *Nevada v. Hall*, 440 U.S. 410, 430 (1979) (Blackman, J., dissenting) (state immunity "implied as an essential component of federalism").

[4] Supplemental Brief for the Secretary of Labor ("U.S. Supp. Br.") 2, 9 ("Few principles are more pervasively reflected in the text and overall structure of the Constitution; few are more fundamental to the Framers' conception of our system of government").

The first case interpreting and applying *National League of Cities* to federal commerce power regulation is *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981). Justice Marshall writing for the Court clarified the distinction in *National League of Cities* between Congress' proper exercise of its plenary commerce powers over the private marketplace within the States that, pursuant to the Supremacy Clause, preempts inconsistent state regulation of private persons, and Congress' direct regulation of the internal operations of state and local governments, which may be unconstitutional if it impairs the States' ability to function effectively in the federal system. With this crucial distinction in mind, the Court articulated a useful test for state immunity from federal regulation:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citations omitted; emphasis in original).

Recognizing that the constitutional balance struck in *National League of Cities* between federal wage and overtime regulation and the States' freedom to structure relationships with their employees may be different when the federal regulation governs other than wages and overtime, the Court, influenced by Justice Blackmun's concurring opinion in *National League of Cities*, 426 U.S. at 856, added a footnote caveat:

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth

> Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies submission.

452 U.S. at 288 n.29 (citations omitted).

In *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982), Chief Justice Burger writing for the Court reaffirmed the *Hodel* articulation of the *National League of Cities* test and applied it to the federal Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982), which provided railroad employees the right to strike under certain conditions. The Court confirmed that "under most circumstances federal power to regulate commerce could not be exercised in such a manner as to undermine the role of the states in our federal system," 455 U.S. at 686, but nevertheless upheld the application of the federal law to the state-owned Long Island Railroad. The Court concluded that interstate railroads uniquely had been "subject to comprehensive federal regulation for nearly a century" and that "Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the *national economy*." *Id.* at 687, 688 (emphasis added). The Long Island Railroad, part of the private nationwide rail system for over one hundred years, had continued to comply with federal railway labor regulation during the first thirteen years of state ownership, until, in the midst of a labor dispute, the State attempted to assert Tenth Amendment immunity. *Id.* at 681. In upholding the continued application of federal law to the railroad, the Court simply followed the guidance of *National League of Cities*, which, citing three precedents,[5] had concluded that occasional state ownership of a railroad connected to the interstate system was one activity clearly not protected by the Tenth Amendment since it was not a tradi-

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[5] *Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936).

tional local government activity.[6] 426 U.S. at 854 n.18. *See also* APTA Br. 27-30. The federal interest in uniform railroad labor regulation has always been substantial; the State acquired the railroad with that knowledge and its submission to the federal requirements further demonstrated that no equivalent state interest was put at risk.

FERC v. Mississippi, 456 U.S. 742 (1982), "present[ed] an issue of first impression," *id.* at 759, and therefore an opportunity to define further the constitutional principles set forth in *National League of Cities*. Unlike *National League of Cities*, the Court was not asked to consider the applicability of general regulation to the States as States but rather to consider an attempt by the federal government through the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), "to use state regulatory machinery to advance federal goals," 456 U.S. at 759, in the States' regulation of private parties. The Court emphasized that PURPA functioned in an area where the federal government could preempt entirely State regulation, but instead "out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards." *Id.* at 765 (emphasis in original).

The "central point" of Justice Blackmun's opinion for the Court in *FERC* is the "proposition[] that Congress may pre-empt the States in the regulation of private con-

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[6] The Court in *LIRR* noted that there were only two state-owned commuter railroads in the nation. 455 U.S. at 686 n.12. The Solicitor General had urged the Court to distinguish between a "commuter railroad" and "a conventional public mass transit system," U.S. Br. 24-25, *LIRR*, which " 'is now of necessity provided almost exclusively by state and local governments,' " *id.* at 25-26 (citation omitted), noting that this distinction "is firmly grounded in the separate histories," "the applicable law," and "the usages" of two entirely different types of transportation, *id.* at 25 n.19.

duct." *Id.* at 767 n.30.[7] He states: "We hold only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area. This does not foreclose a Tenth Amendment challenge to federal interference with the State's ability 'to structure employer-employee relationships,' 426 U.S., at 851, while providing 'those governmental services which [its] citizens require,' *id.*, at 847, as was the case in *National League of Cities.*" 456 at 769-70 n.32. Thus, the Court again affirmed the vitality of the principles set forth in *National League of Cities* and its application to federal regulation of the States as States but carefully distinguished PURPA's impact on the actions taken by states to regulate private parties.[8]

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[7] *Compare with Pacific Gas & Electric Co. v. State Commission*, 103 S. Ct. 1713 (1983). At least since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816), "it has always been the law that state legislative and judicial decisionmakers must give preclusive effect to federal enactments concerning non-governmental activity, no matter what the strength of the competing local interests." *FERC*, 456 U.S. at 766. This is true though Congress exercises its authority "in a manner that displaces the States' exercise of their police powers," *Hodel*, 452 U.S. at 291, or in such a way as to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important," *id.* at 290, or, to put it still more plainly, in a manner that is "extraordinarily intrusive," *id.* at 305 (Powell, J., concurring).

[8] Justice Blackmun recognized that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," *id.* at 761-62, but noted there is nothing in PURPA "directly compelling" the States to enact or enforce a "regulatory program." *Id.* at 765. Rather, in adopting "a less intrusive scheme," *id.*, "Congress intended to defer to state prerogatives—and—expertise. . . ." *Id.* at 765 n.29. Moreover, the State could have abandoned "regulation of the field altogether," *id.* at 766, was not required to adopt or implement any standards, and could have adopted different standards. *Id.* at 749-50. While the Court found PURPA's requirement that the state adjudicate disputes arising under the statute "more troublesome," *id.* at 759, it noted that the State Commission had jurisdic-

FERC emphasizes the precise principle of federalism underlying *National League of Cities*: It is when Congress regulates the States directly but denies them the choice between opting out of a federal program or waiving their immunity and participating that the federal statute most threatens state sovereignty. Thus, Congress' direct and unconditional imposition of the FLSA minimum wage and overtime compensation requirements was so "intru[sive]" that "even the State's discretion to achieve its goals in *the way it thinks best* is . . . overridden entirely," *EEOC*, 103 S. Ct. at 1062 (emphasis in original) (quoting 426 U.S. at 848). FLSA regulation endangered "the States' ability to structure operations and set priorities over a wide range of decisions," *id.* (quoting 426 U.S. at 849-50), and "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." *Id.* (citing 426 U.S. at 846-52). Congress imposed these requirements without providing the State any policy options. Nor was the federal government prepared to step in and require maintenance of essential services or provide them directly should the States find that compliance with the FLSA impaired their ability to perform essential governmental functions. It is questionable, in fact, whether the federal government, without the States' consent, could assume, consistent with the Constitution, the

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tion to entertain analogous State claims, *id.* at 760, and that therefore the principles of *Testa v. Katt*, 330 U.S. 386, 395 (1947) (state courts must enforce federal law where they have appropriate jurisdiction) were controlling. Thus, to the extent that Congress' partial preemption of state regulation of private utilities in an area of overriding national concern—energy conservation—impinges on the state regulatory machinery, Justice Blackmun painstakingly demonstrated that Congress left the States policy choices, selected the least intrusive approach and remained within the bounds of established precedent, holding that, unlike the FLSA, there is nothing in PURPA that "impair[s] the ability of the States 'to function effectively in a federal system.'" *Id.* at 765-66 (quoting *Fry*, 421 U.S. at 547 n.7).

direct provision and operation of police, fire, transit and other local traditional governmental functions.[9]

On the other hand, this Court has upheld conditions on states receiving federal grants authorized pursuant to the spending powers because the States may reject both the aid and the conditions. "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' . . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . ." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at 17; *see also* APTA Br. 39-44.[10]

The fourth case which articulates the current doctrine of Tenth Amendment and federalism constraints on the

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[9] States have provided police protection, transit services, public hospitals, fire departments, libraries and schools over the course of decades not as a matter of choice, but because such services were critical to the community and could not be provided privately or by the federal government. As Justice Marshall noted in an analogous context, "[t]o suggest that the State had the choice of either ceasing operation of these vital public services [operating hospitals and schools] or 'consenting' to federal suit [under the FLSA] suffices, I believe, to demonstrate that the State had no true choice at all. . . ." *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 296 (1973) (Marshall, J., concurring).

[10] *See also Edelman v. Jordan*, 415 U.S. 651, 688-89 (1974) (Marshall, J., dissenting) ("Unlike the Fair Labor Standards Act involved in . . . *Employees*, . . . the Social Security Act does not impose federal standards and liability upon all who engage in certain regulated activities, including often-unwilling state agencies. Instead, the Act seeks to induce state participation in the federal welfare programs by offering federal matching funds in exchange for the State's voluntary assumption of the Act's requirements. I find this basic distinction crucial: it leads me to conclude that by participation in the programs, the States waive whatever immunity they might otherwise have from federal court orders requiring retroactive payment of welfare benefits.").

commerce power is *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983). The Court in an opinion by Justice Brennan upheld the application of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1982) ("Age Act"), against a mandatory state retirement policy for state-employed game wardens because in the judgment of the majority, one part of the three-part test was not met. The Court recognized that the case involved, *first*, federal regulation of the State *qua* State, 103 S. Ct. at 1061, and *second*, an area of traditional governmental functions, *id.* at 1062. This left only the issue of whether the federal law displaced a "core state function." The Court concluded that, unlike the FLSA, 103 S. Ct. at 1061 n.11, the Age Act provisions "[do] not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions' " because they do not preclude the States from keeping only fit game wardens. *Id.* at 1062. The States could accomplish their objective by changing the age requirement to a fitness requirement, or by continuing "to do *precisely what they are doing now*," *id.* (emphasis in original), and invoking the *bona fide* occupational qualification exception to the Age Act. Thus *EEOC* "conclude[d] that the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States." *Id. See also* APTA Br. 14, 42 n.64. Unlike federal regulation of wages and hours, the Age Act requirements in the view of the majority [11] simply did not present the same "wide-ranging and profound threat to the structure of State governance," 103 S. Ct. at 1062, as does the FLSA.

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[11] The four dissenting Justices thought that the Age Act had a more significant effect on the "core state function" of hiring and keeping employees and therefore would have held the Age Act's application to state game wardens unconstitutional. 103 S. Ct. at 1069-72.

As these decisions demonstrate, the Court has continued to consider and refine the principles of federalism recognized in *National League of Cities*, while remaining "faithful to the fundamental constitutional insight that links *National League of Cities* to the broad mainstream of this Court's federalism jurisprudence." U.S. Supp. Br. 11. The principles articulated in *National League of Cities* and in subsequent decisions are relatively narrow,[12] but form a constitutionally appropriate restraint on Congress' expanding exercise of its commerce powers.[13]

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[12] *See, e.g., EEOC*, 103 S. Ct. at 1061 n.10 ("It is worth emphasizing . . . that it is precisely this prong of the *National League of Cities* test [requiring regulation of the States as States] that marks it as a specialized immunity doctrine rather than a broad limitation on federal authority.").

[13] Garcia, but not the Solicitor General, urges overruling all, or part of, *National League of Cities*. Our legal system, however, is premised on respect for the authority and guidance of precedent, and "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 104 S. Ct. 2305, 2311 (1984). *See also Florida Department of Health and Rehabilitation Services v. Florida Nursing Home Association*, 450 U.S. 147, 153 (1981) (Stevens, J., concurring). Here, several factors strengthen the presumption that *National League of Cities* should not be overruled. First, it is a relatively recent decision, which was correctly decided and reaffirmed in several subsequent decisions. Moreover, since it was decided, all of the Justices who dissented from it, except Justice Stevens, have written or joined in opinions confirming its validity. *Compare EEOC*, 103 S. Ct. at 1060; *FERC*, 456 U.S. at 758-59; *LIRR*, 455 U.S. at 683, 686; *Hodel*, 452 U.S. at 287-88; *with EEOC*, 103 S. Ct. at 1067 (Stevens, J., concurring). Second, it is consistent with this Court's federalism precedent. *Cf. Washington Revenue Department v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 745-50 (1978). Third, state and local governments have relied upon it in structuring their employee relations and budgetary allocations and in initiating or expanding existing essential services. *See United States v. Mason*, 412 U.S. 391, 399-400 (1973). Since FLSA requirements would have a major impact on state budgetary allocations, *see infra* at 22 & n.29, and the States' ability to perform the services they have determined their populations need, *stare decisis* has particular force

II. THE PRINCIPLES SET FORTH IN *NATIONAL LEAGUE OF CITIES* AND SUBSEQUENT DECISIONS ARE DERIVED FROM THE LONG DEVELOPMENT OF THE LAW CONCERNING FEDERAL AND STATE POWERS.

Few doctrines of constitutional law have undergone the expansive reach of interpretation accorded the Commerce Clause. This Court stated in 1824 that Congress' commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the Constitution.*" *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (emphasis added).[14] But for more than one hundred years there-

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in this case. *Perez v. Campbell*, 402 U.S. 637, 667 (1971) (Blackmun, J., dissenting) (*stare decisis* has "particular validity and application in a situation" involving "a substantive matter peculiarly within [the States'] competence").

Finally, *stare decisis* provides "stability" in legal decision-making in general and the Supreme Court's precedents in particular. *Illinois v. Gates*, 103 S. Ct. 2317, 2335, 2338 (1983) (White, J., concurring). *See also United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (Frankfurter, J., dissenting); *Helvering v. Hallock*, 309 U.S. 106, 129 (1940) (Roberts, J., dissenting); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 2, 9 (1983); Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 218. *See also Donovan v. Dewey*, 452 U.S. 594, 607 (1981) (Stevens, J., concurring) ("disagreement with the holding in a prior case is not a sufficient reason for refusing to honor it"). The dissent's perception that *National League of Cities* would have "profoundly pernicious consequences," 426 U.S. at 860 (Brennan, J., dissenting), has not come to pass. Thus, this is an especially strong case for adherence to the doctrine of *stare decisis*.

[14] In *Gibbons*, Chief Justice Marshall "described the federal commerce power with a breadth never yet exceeded," *Wickard v. Filburn*, 317 U.S. 111, 120 (1942), but he was careful to observe that it did not extend to those internal concerns "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." 22 U.S. (9 Wheat.) at 195.

after, Congress enacted few statutes utilizing this regulatory power. It was only when Congress attempted to regulate state and local governments directly that the constraints of federalism inherent in the structure of our Constitution and expressly stated in the Tenth Amendment took on particular significance in the reconciliation of competing constitutional values. To aid in this reconciliation, the Court applied its extensive federalism jurisprudence derived from the structure of the Constitution and the framers' vision of a federalist system.[15]

A. *National League Of Cities* And Subsequent Decisions Provide The Requisite Corollary To This Court's Approval Of Congress' Expanding Exercise Of Its Commerce Powers.

Commerce Clause doctrine initially developed in cases where, in the absence of congressional action, this Court assessed whether state laws intruded too far into the interstate domain. This assessment invited a narrower view of federal power than that espoused in *Gibbons* since often the Court was only concerned with whether a particular activity regulated by the State (*e.g.*, insurance, mining, manufacturing) was or was not in inter-

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[15] The derivation of constitutional doctrine from the structure of the Constitution and the implications of its provisions is not unique to federalism. *See, e.g., Jones v. Helms*, 452 U.S. 412, 418-19 (1981) (right to travel); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (same); *United States v. Guest*, 383 U.S. 745, 757-58 (1966) (same); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (right of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (same); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (same—marriage and procreation); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (freedom of association); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963) (same); *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2781-82 (1983) (separation of powers). *Compare, e.g., Massachusetts v. United States*, 435 U.S. 444, 454-55 (1978) (Brennan, J.) (principles of federalism).

state commerce.[16] When Congress first began to exercise its commerce authority directly, similar analysis was sometimes invoked to limit the scope of federal power.[17] In most cases after the turn of this century, however, the Court upheld Congress' limited extension of its commerce power to private intrastate transactions that affected the interstate market.[18] It was not until the 1930's that Congress, in response to the Great Depression, sought to exercise its commerce powers fully in ways thought to impinge upon state policy choices affecting the intrastate marketplace. The Court initially responded by invoking a limited view of the exercise of commerce power to frustrate Congress' enactment of New Deal legislation.[19] Such limitations on congressional commerce power were neither constitutionally correct nor, during the economic depression, politically practicable. The 1930's conflict between federal and state power in the regulation of private commerce was resolved in favor of an expansive view of congressional power under the Commerce Clause. *E.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding federal wage and hour regulations for producers of goods for interstate commerce, holding that "regulations of commerce *which do not infringe on some constitutional prohibitions* are within the plenary power conferred on Congress by the Commerce

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[16] *See, e.g., Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *Nathan v. Louisiana*, 49 U.S. (8 How.) 73 (1850).

[17] *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). These cases are no longer good law.

[18] *See, e.g., The Shreveport Rate Case, Houston & Texas Railway v. United States*, 234 U.S. 342 (1914).

[19] *E.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Bituminous Coal Conservation Act); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546-50 (1935) (National Industrial Recovery Act); *see* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 653 (1946).

Clause") (emphasis added). Today, the restraints within the Commerce Clause itself seem limited solely by the imagination of Congress, which need show only that there is a "rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." [20]

Concomitant with the expanding exercise of the Commerce Clause was the increasing recognition by this Court that other provisions of the Constitution, including the amendments guaranteeing individual rights, placed limitations on the commerce power.[21] The expansion of federal commerce regulation to purely intrastate local activities also created the potential of federal interference with core state functions. The conflict initially was avoided because Congress expressly exempted state and local governments in statutes such as the National Labor Relations Act and the FLSA.[22] Instead, it generally chose one of two routes of "cooperative federalism." It employed its policy requirements for state action as explicit conditions of federal funding under the Spending Clause. This gave States the option of rejecting the aid and the conditions that came with it. *See, e.g., Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143 (1947) (while Congress cannot "regulate[] local political activities," it may fix the

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[20] *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964). *See also, e.g., Perez v. United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

[21] *E.g., Leary v. United States*, 395 U.S. 6 (1969) (Fifth Amendment privilege against self-incrimination); *United States v. Jackson*, 390 U.S. 570 (1968) (Sixth Amendment); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893) (Fifth Amendment takings clause).

[22] 29 U.S.C. § 152(2) (1982); Fair Labor Standards Act, ch. 676, § 3(d), 52 Stat. 1060 (1938). *See also* Occupational Safety and Health Act, 29 U.S.C. § 652(5) (1982); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1003(b)(1), 1321(b)(2) (1982). Thus, when in *United States v. Darby*, 312 U.S. 100 (1941), the Court made its subsequently repudiated comment that

terms upon which funds to the States are disbursed).[23] Alternatively, Congress urged the States to cooperate in achieving mutually shared objectives and limited the scope of direct federal regulation to national and interstate concerns, providing for state decision-making and flexibility in the local implementation of national policies.[24]

For almost two hundred years of constitutional federalism, a broad assault on core state functions under the Commerce Clause was avoided either because Congress expressly excluded the States from direct federal regulation

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the Tenth Amendment "states but a truism," *id.* at 124, it was solely in reference to congressional regulation of private persons.

[23] *See, e.g.*, Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, § 10 [§ 13], 78 Stat. 302, 307 (codified as amended at 49 U.S.C. app. § 1069 (1982)); Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, tit. III, § 314, 92 Stat. 2689, 2750-51 (codified at 49 U.S.C. app. § 1615 (1982)); Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, tit. III, § 318(b), 96 Stat. 2097, 2154 (codified at 49 U.S.C. app. § 1618 (1982)); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, tit. VI, § 605, 79 Stat. 27, 58 (codified as amended at 20 U.S.C. § 3384 (1982)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, tit. V, § 513, 86 Stat. 816, 894 (codified at 33 U.S.C. § 1372 (1982)); Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443, § 3(a), 78 Stat. 447, 452-53, 455-56, as amended by Medical Facilities Construction and Modernization Amendments of 1970, Pub. L. No. 91-296, §§ 115, 116(b)-(c), 123, 84 Stat. 336, 341, 342, 344 (codified at 42 U.S.C. §§ 291d, 291g (1982)). *See also Steward Machine Co. v. Davis*, 301 U.S. 548, 586 (1937) (drawing "the line intelligently between duress and inducement").

[24] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 706(b), 706(c), 708, 709(b), 78 Stat. 241, 259-60, 262-63, *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4, 6, 86 Stat. 103, 104-05, 107-08 (codified at 42 U.S.C. §§ 2000e-5(c), 2000e-5(d), 2000e-7, 2000e-8(b) (1982)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 18, 84 Stat. 1590, 1608-09 (codified at 29 U.S.C. § 667 (1982)). *See* D. Walker, *Toward a Functioning Federalism* 65-114 (1981); R. Leach, *American Federalism* 227-28 (1970).

or the Court interpreted Congress' intent to exclude them.[25] But the issue finally was joined when Congress removed the statutory exemption of state and local governments from FLSA federal wage and hour regulations.[26] Congress first sought to bring certain employees of publicly owned schools and hospitals into the coverage of the FLSA through its "enterprise" concept. The Court upheld Congress' actions in *Maryland v. Wirtz*, 392 U.S. 183 (1968). It failed, however, to recognize the distinctive nature of broad federal regulation of the State *qua* State, in contrast to federal regulation of private individuals within the State. Justice Douglas, joined by Justice Stewart, dissented, stressing this distinction and concluding that by its regulation of the State *qua* State, Congress' actions were "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism." [27] *Id.* at 201.

Emboldened by *Wirtz*, Congress acted to apply the FLSA to almost all state and local government employ-

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[25] In a few instances, Congress' regulation of interstate or foreign commerce may have affected directly the isolated involvement of a state as a participant in a nationwide network of railroads or waterways. *See LIRR*, 455 U.S. 678; *Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. California*, 297 U.S. 175 (1936); *Sanitary District v. United States*, 266 U.S. 405 (1925). In other cases, the federal war powers justified temporary restraints on the states. *E.g.*, *Case v. Bowles*, 327 U.S. 92 (1946). But in none of the cases did this Court address an attempt by Congress, in the exercise of its Commerce Clause powers, to regulate broadly and directly a core function of state government.

[26] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831.

[27] Justice Douglas, who supportively participated in decisions approving Congress' expanding exercise of the commerce power, noted:

ees.[28] This Court's expansive view of the commerce power and its decision in *Wirtz* encouraged an unprecedented congressional attempt to usurp fundamental state decision-making authority over employee relations with a potentially crippling effect on state budgets.[29] In *National League of Cities*, the Court rejected that attempt, reaffirming Congress' plenary commerce power, limited only by other provisions in the Constitution, and held that Congress' attempt to apply FLSA wage and hour provisions to most state employees had struck unconstitutionally at the core functions of the States in contravention of the principles of federalism. 426 U.S. at 851.

National League of Cities, contrary to Garcia's position and that of Justice Stevens in his concurring opinion in *EEOC*, 103 S. Ct. at 1064, did not spring full born into a hostile field of case law. In fact, the Court's

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> The exercise of the commerce power may also destroy state sovereignty. All activities affecting commerce, even in the minutest degree, *Wickard v. Filburn*, 317 U.S. 111, may be regulated and controlled by Congress. . . . If constitutional principles of federalism raise no limits to the commerce power where regulation of State activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, . . . to quadruple their police forces to prevent commerce-crippling riots, etc.?

Id. at 204-05. While the majority rejected this argument, it did acknowledge that courts have "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'" *Id.* at 196.

[28] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58-62.

[29] In *National League of Cities*, the state and local government appellants made a compelling showing of the substantial costs and other major dislocations that would result from application of the FLSA. *But see* 426 U.S. at 851 (". . . particularized assessments of actual impact are [not] crucial to resolution of the issue presented, however"); *EEOC*, 103 S. Ct. at 1063; *FERC*, 456 U.S. at 770 n.33; *Hodel*, 452 U.S. at 292 n.33.

analysis in related cases subsequent to *Wirtz* soon led it to conclude that "we do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative." 426 U.S. at 854. These post-*Wirtz* decisions presaged the *National League of Cities* reversal of *Wirtz*. In *Fry*, for example, this Court expressly rejected the statement uttered thirty-four years earlier in *Darby* that the Tenth Amendment is a mere "truism," but instead found it "not without significance" in declaring "the constitutional policy" that Congress may not impair "the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n.7.[30]

Despite *Fry*'s recognition of the limits of federalism contained in the Tenth Amendment, the temporary national wage freeze at issue there was upheld because it was justified by a national emergency and placed no affirmative obligations on the States.[31] The same "heightened solicitude for the role of the state in the federal system," [32] found in *Fry* was exhibited in other decisions

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[30] The Solicitor General in *National League of Cities*, as in the case at bar, acknowledged that the Tenth Amendment placed some limitation on the exercise of the commerce power. Brief of the Appellee 38 (October Term, 1974).

[31] It is enlightening to examine the statute at issue in *Fry* under the test of *National League of Cities* as it has evolved today. *See supra* at 8. The federal legislation is directed at States *qua* States and addresses the compensation of state employees, which indisputably is an attribute of state sovereignty. 426 U.S. at 845. Since the nationwide wage freeze was comprehensive, it necessarily covered some traditional governmental functions. But it survived the States' claim of immunity because the federal interest justified the States' submission. *Hodel*, 452 U.S. at 288 n.29. The federal interest in comprehensive emergency controls justified the minimal interference with the States resulting from a temporary freeze of the wage choices that the States themselves had made for their employees and that reduced rather than increased pressures on the States' budgets.

[32] Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harv. L. Rev. 1871, 1874 (1976).

of this Court after *Wirtz*. In *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973), the Court concluded that the FLSA could not be read to authorize suits against the States by their employees in federal court. The Court did not decide whether the Eleventh Amendment or federalism would bar such suits should Congress expressly authorize them, but out of heightened deference to the States, the Court denied employees access to the federal courts. 411 U.S. at 286-87.[33]

The limitations on federal commerce power set forth in *National League of Cities* are consistent with the principles of constitutional federalism elsewhere applied by this Court, although the nature of federal power and the State's constitutional interest may vary.[34] Congress' power to enforce by appropriate legislation the human rights guarantees of the Fourteenth Amendment, for example, required a special constitutional provision to authorize Congress in these limited circumstances to prohibit certain state actions. In the exercise of these

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[33] For other cases "manifesting multiple strains of solicitude for states," Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harv. L. Rev. 1871, 1876 (1976), see *Paul v. Davis*, 424 U.S. 693 (1976), and *Edelman v. Jordan*, 415 U.S. 651 (1974). *See also Fry*, 421 U.S. at 549 (Rehnquist, J., dissenting).

[34] *Compare, e.g., National League of Cities*, 426 U.S. at 833 (interstate commerce powers); *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts will not enjoin certain state court criminal proceedings); *Hopkins Savings Association v. Cleary*, 296 U.S. 315 (1935) (necessary and proper clause); *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (location of state capital); *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 583-86 (1895) (tax on state instrumentalities) *and Hans v. Louisiana*, 134 U.S. 1 (1890) (federal courts will not entertain suits against a State by its citizens), *with Case v. Bowles*, 327 U.S. 92 (1946) (war power); *Board of Trustees v. United States*, 289 U.S. 48 (1933) (foreign commerce); *and Sanitary District v. United States*, 266 U.S. 405 (1925) (treaty powers).

powers, therefore, "Congress is not limited by the same constraints that circumscribe the exercise of its Commerce Clause powers." [35]

B. *National League Of Cities* And Subsequent Decisions Are Deeply Rooted In The Structure Of The Constitution And Fully Consistent With This Court's Development Of Federalism Jurisprudence.

This Court's reliance on the constitutional policy of federalism and the Tenth Amendment to preserve the States' capacity to function effectively is fully supported by the structure of the Constitution itself and the framers' intent in establishing a federal system in which "[t]he Federal and State Governments are in fact but different agents and trustees of the people instituted with different powers and designated for different purposes." *The Federalist No. 46*, at 315 (J. Madison) (J. Cooke ed. 1961).

The founding fathers did not always establish clear jurisdictional boundaries between the federal and state governments, but the Solicitor General's conclusion is beyond doubt: "The Constitution, read as a whole, necessarily presupposes the existence of, and thus requires the protection of, some sphere of autonomy for the states in

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[35] *See EEOC*, 103 S. Ct. at 1064 n.18, *but see id.* at 1072-73 (Burger, C.J., dissenting). Congress has the "power to enforce by appropriate legislation" the Thirteenth, Fourteenth, and Fifteenth Amendments, U.S. Const. amend. XIII, § 2, amend. XIV, § 5, and amend. XV, § 2. Congress' authority to pass legislation enforcing the Due Process Clause of the Fourteenth Amendment includes, by incorporation, authority to enforce portions of the first eight Amendments as well. *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). This Court has consistently held that Congress' power to enact legislation under the Fourteenth Amendment is not limited by the principles of federalism in the same way as is the Commerce Clause. *City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 n.54 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

the conduct of their own core operations." [36] U.S. Supp. Br. 4. Thus, the States were preserved as separate governmental entities with essential functions to perform in the federal system, and the Constitution expressly recognized and guaranteed their distinct governmental role.[37] States, moreover, retain "certain exclusive and very important portions of sovereign power." [38] Limitations on that power are expressly stated in the Constitution;[39] federal power, on the other hand, is limited to specifically enumerated authority.[40] The very purpose of limiting congressional power to expressly delegated authority was to prevent federal interference with the States' capacity to meet their local responsibilities.[41] The structure of the

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[36] Garcia apparently agrees. G. Supp. Br. 4 ("The framers of the Constitution clearly envisioned a federal system—one in which both the federal government and the States possess sovereign authority.").

[37] *E.g.*, the Constitution provides specific guarantees for the States against invasion, and of a republican form of government, U.S. Const. art. IV, § 4. It assures full faith and credit to state court judgments, art. IV, § 1; interstate rendition of fugitives from justice, art. IV, § 2; territorial integrity, art. IV, § 3, cl. 1; protection against domestic violence, art. IV, § 4; reserved governmental powers, amend. X; and immunity from suit, amend. XI.

[38] *The Federalist No. 9*, at 55 (A. Hamilton) (J. Cooke ed. 1961) (hereinafter all citations to *The Federalist* are to J. Cooke ed. 1961).

[39] *See, e.g.*, U.S. Const. art. I, § 10; amend. XIV, § 1.

[40] The principal sources of federal power are found at U.S. Const. arts. I, II, III and IV and amends. XIII, XIV, XV, XVI, XIX, XXIII, XXIV and XXVI.

[41] *See* I *The Records of the Federal Convention of 1787* (M. Farrand ed. 1966) ("Farrand") 53 (Butler and Randolph); *id.* at 133 (Sherman); *id.* at 492 (Ellsworth); *id.* at 340-41 (Martin); *id.* at 404 (Pinckney); III Farrand at 132 (Madison). *See* also III *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliot 2d ed. 1896) ("Elliot") 40, 107 (Virginia); IV Elliot 50 (North Carolina); I Elliot 492 (Letter of Sherman and Ellisworth); *cf.* III Elliot 420 (Virginia) (Marshall

Constitution thus presumes that the States will retain their ability to perform essential functions and services for their citizens.[42] As James Madison explained:

> The powers delegated by the proposed Constitution to the Federal Government . . . will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[43]

Ultimately, the responsibility for mediating the boundaries of federalism devolved, during the course of the framers' debates, to the federal judiciary. The original Virginia Plan presented at the Constitutional Convention would have vested this power in Congress. It contained resolutions that would have empowered the national legislature "to call forth the force of the Union [against] any member of the Union failing to fulfill its duty under the articles thereof," [44] and to "negative all laws passed

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stated: "[a]ll the restraints intended to be laid on the state governments (besides where an exclusive power is expressly given to Congress) are contained in the 10th section of the 1st article."). *See also EEOC*, 103 S. Ct. at 1077-80 (Powell, J., dissenting).

[42] *See The Federalist No. 39*, at 256-57 (J. Madison) ("local or municipal authorities" are not "subject within their respective spheres to the general authority"); *The Federalist No. 40*, at 261-62 (J. Madison); *The Federalist No. 45* (J. Madison); *The Federalist No. 32*, at 199-200, 203 (A. Hamilton) ("all authorities of which the States are not explicitly divested in favor of the Union remain with them in full vigor"); *The Federalist No. 59*, at 399-400 (A. Hamilton); *The Federalist No. 82*, at 553-54 (A. Hamilton); *see also I Farrand* 86, 136 (Dickinson); *id.* at 137 (Pinckney); *id.* at 155 (Mason); *id.* at 157 (Wilson); *id.* at 439 (Martin); *id.* at 406 (Ellsworth); *see* II Elliot 355 (New York); III Elliot 257-59 (Virginia); III Farrand 139-40, 144 (Pennsylvania).

[43] *The Federalist No. 45*, at 313 (J. Madison).

[44] I Farrand 21.

by the several States, contravening in the opinion of the National Legislature the articles of Union." [45] The first proposal was deleted without a vote and the second was extensively debated in various forms, and several times rejected.[46] In its place, the Supremacy Clause was adopted and its interpretation was vested in the Supreme Court.[47] As Gouverneur Morris, a principal draftsman of the Constitution, declared, "[a] law that ought to be negatived will be set aside in the Judiciary," and thus this Court became the ultimate arbiter of federalism issues.[48]

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[45] *Id.*

[46] *See* I Farrand 54, 162-63, 164, 168, 171, 173; II Farrand at 28, 390-92. Garcia's statement, G. Supp. Br. 6 n.3, that the congressional power to veto state laws "was defeated by only one vote," and only because it was thought "unnecessary," distorts the records of the Federal Convention. The defeat Garcia refers to was on a vote to resubmit the issue to committee for further consideration. II Farrand 390-92. Congressional power to negative state laws was opposed on many grounds. Mr. Williamson, for example, opposed the power on the grounds that "it might restrain the States from regulating their internal police," I Farrand 165, that "[t]he national legislature ought to possess the power to negativing such laws only as will encroach on the national government," *id.* at 169, and that the "State Legislatures ought to possess independent powers in cases purely local, and applying to their internal policy." *Id.* at 171. *See also* I Farrand at 167 (Bedford); *id.* at 168 (Butler); II Farrand at 27 (Sherman); *id.* at 27-28 (Morris); *id.* at 391 (Rutledge).

[47] U.S. Const. art. VI, cl. 2; *see* II Farrand 28-29, 389.

Describing the Supremacy Clause as "only declaratory of a truth," Hamilton cautions that "it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. They will be merely acts of usurpation and will deserve to be treated as such." *The Federalist No. 33*, at 204, 207 (A. Hamilton). *See also* "Opinion as to the Constitutionality of the Bank of the United States" *reprinted in* G. Gunther, *Cases and Materials on Constitutional Law* 97 (10th ed. 1980) (Congress "is not authorized to *regulate* the *police* of [Philadelphia].") (emphasis in original).

[48] II Farrand 28; IV Farrand 83-84 (Madison) ("Judicial Department as a final resort in relation to the States"); *see also The*

This Court's identification of the Tenth Amendment as an affirmative expression of constitutional limits on federal power to regulate the States as States is fully supported by the history of State ratification of the Constitution and adoption of the Tenth Amendment. To address the substantial concern expressed during the ratification debates about federal encroachment on the States' essential responsibilities, the Tenth Amendment was proposed, not to establish residual state capacity to perform essential governmental functions—that capacity was clearly presumed in the structure of the Constitution itself—but rather to confirm expressly the importance of protecting the States from "an undue administration of the federal government." [49] Indeed, during the ratification process, the proposal to amend the Constitution to reserve state powers was recommended by more States than any of the other proposals later adopted in the Bill of Rights.[50] One concern expressed in the de-

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Federalist No. 39, at 256 (J. Madison). This conclusion was confirmed during the ratification debates. As Oliver Ellsworth told the Connecticut convention: "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." II Elliot 196. *See* III Elliot 553 (commentary of John Marshall); IV Elliot 485 (Van Buren). According to Hamilton, under "a limited constitution," the Court has the duty "to declare all acts contrary to the manifest tenor of the constitution void." *The Federalist No. 78*, at 524 (A. Hamilton) "Courts of justice are to be considered as bulwarks of a limited constitution against legislative encroachments." *Id.* at 526. *See also The Federalist No. 39*, at 256 (J. Madison).

[49] *See* I Elliot 322 (Ratification of Commonwealth of Massachusetts).

[50] I Elliot 322 (Massachusetts); *id.* at 326 (New Hampshire) ("all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several states . . . ."); *id.* at 327 (New York); II Elliot 406 (New York); I Elliot 336 (Rhode Island). *See also id.* at 325 (South Carolina); III Elliot 107, 420, 626, 659 (Virginia); II Elliot 550 (Maryland); IV Elliot 242, 244 (North Carolina); II Elliot 545 (Pennsylvania).

bates was that even though the Constitution limited federal authority to expressly enumerated powers, it was possible that in the exercise of such delegated powers, Congress could so encroach upon the residual powers of the States so as to destroy their capacity to function as governmental entities.[51] Without the confidence that a provision expressly protecting the residual powers of the States would be adopted, it is doubtful that ratification would have taken place.[52] The ratification debates make clear that the Tenth Amendment is not merely a "truism;" it was necessary to ensure that the powers delegated to the federal government were not "perverted in ways that would destroy the general welfare," [53] and to "effectually guard against an undue administration of the Federal government." [54]

From the principles of federalism envisioned by the framers and embraced in the constitutional structure, this Court has woven a tapestry of federalism jurisprudence, of which *National League of Cities* is an integral part. It is the linchpin if this nation is to remain a federal society. Its teachings are fully consistent with other applications of this Court's federalism precedent which reflect "sensitivity to the legitimate interests of both State and National Governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971). These principles have

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[51] *See, e.g.*, IV Elliot 51, 75, 136-38, 152-55, 163-64, 168 (North Carolina).

[52] North Carolina refused to ratify the Constitution until the amendments were "laid before Congress." I Elliot 332; IV Elliot 243-44. *See also* I Elliot 329 (New York); III Elliot 242, 626, 659 (Virginia).

[53] III Elliot 442 (Virginia); *see also* IV Elliot 163 (North Carolina); II Elliot 131 (Massachusetts).

[54] I Elliot 326 (New Hampshire). The States wanted to ensure that if "Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution." IV Elliot 179 (North Carolina); *see also id.* at 163.

been applied in numerous ways to recognize and preserve the authority and responsibilities of state and local governments so that "the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*[55]

Federalism limits on federal judicial power are increasingly pronounced in cases raising Eleventh Amendment challenges to federal jurisdiction over state governments. This Court early held that the federalism principle underlying the Eleventh Amendment—that a sovereign government cannot be sued without its consent—would bar a suit by a citizen against his own State in federal court even though the Eleventh Amendment speaks only of a "suit . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI; *see Hans v. Louisiana*, 134 U.S. 1 (1980). The Eleventh Amendment represents a fundamental structural principle of our federal system. *Edelman v. Jordan*, 415 U.S. 651 (1974); *see Pennhurst State School and Hos-*

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[55] *See also* Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019 (1977); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (division of power among the "legislative, executive and judicial powers of a State" is a matter solely for state determination); *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 394 (1880) ("the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution."); *United States v. Baltimore & Ohio Railroad Co.*, 84 U.S. (17 Wall.) 322, 327 (1873) (upholding "[t]he right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies . . ."); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) (there can "be no loss of separate and independent autonomy to the States, through their union under the Constitution"); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) ("in many articles of the Constitution . . . the independent authority of the States, is distinctly recognized.").

pital v. Halderman, 104 S. Ct. 900, 911 (1984) (federal courts may not order state officials to conform their conduct to state law since this "conflicts directly with the principles of federalism that underlie the Eleventh Amendment").

Principles of federalism also, for example, have been applied to constrain certain congressional interference with the establishment of voter qualifications in state elections.[56] They have been applied to limit Congress' power to tax certain functions of the States and their political subdivisions;[57] and to invalidate laws constraining the location of a state capital.[58] They have on countless occasions influenced the construction of congressional intent in ways that defer to important state prerogatives.[59] In sum, the principles of federalism articulated in *National League of Cities* are the constitutional underpinnings of the large body of federalism doctrine that pervades the precedents of this Court.

III. THE THREE-PART ANALYSIS OF FEDERAL REGULATION OF STATE ACTIVITIES CURRENTLY INVOKED BY THIS COURT PRESERVES CONGRESSIONAL AUTHORITY WHILE PROTECTING THE INTEGRITY OF STATE GOVERNMENTS AND THEIR POLITICAL SUBDIVISIONS.

The analysis established in *National League of Cities*, stated succinctly as a three-part test in *Hodel*, *see supra* at 8, and applied in subsequent cases, is a fully work-

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[56] *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Black, J.).

[57] *See Indian Motocycle Co. v. United States*, 283 U.S. 570 (1931); *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); *see also* cases cited *infra* at 43 n.74.

[58] *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

[59] *E.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 359-63 (1977); *United States v. Bass*, 404 U.S. 336, 349-51 (1971); *Indian Motocycle Co. v. United States*, 283 U.S. 570 (1931); *Ambrosini v. United States*, 187 U.S. 1 (1902).

able doctrine that ensures thorough consideration of all legitimate federal and state constitutional interests. The result of such judicial scrutiny is in effect a balancing of the importance of each sovereign's interests—a balancing for which the Court's tests and precedents provide objective and understandable criteria. It furthermore is a modern doctrine that fully recognizes Congress' plenary power to regulate the interconnected national marketplace; it also, however, preserves the essential integrity and core governmental capacity of the States to function effectively in the federal system, so important today as the nation's population grows, and local needs become increasingly critical, increasingly diverse, and increasingly incapable of a single national solution.

A. This Court Should Continue To Subject To Its Closest Scrutiny Attempted Federal Regulation Of The State *Qua* State.

Attempted federal regulation of the State's internal operations raises the greatest potential threat to its capacity to function effectively in the federal system. Federal interference with state regulation of private parties in areas delegated to the federal government under the Constitution does not normally raise a similar threat to the State's separate and independent existence. The people, citizens of both the States and the national government, recognize that Congress and the States share the power to regulate private commerce within the States; when Congress acts in furtherance of its commerce powers, however, its actions are supreme and preempt inconsistent state regulation of private individuals. Thus, neither the State's credibility with its citizens, nor its accountability to its electorate, is directly threatened when such federal regulation displaces state regulation.[60]

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[60] Earlier attempts to invoke the Tenth Amendment to limit the extension of commerce powers to private activities within the State have been discredited and cannot now be revived under the test articulated in *Hodel*, 452 U.S. at 287-88.

When Congress attempts to regulate directly the internal decision-making process of state government, however, the situation dramatically changes. For it then encroaches upon the very existence of the States as governmental entities.[61] To enable the States to function in a federal system, the "means and instrumentalities employed for carrying on the operations of their governments . . . should be left free and unimpaired. .. ." *Collector v. Day*, 78 U.S. at 125.[62] Usurpation of a State's internal decision-making authority over its own operations endangers the State's authority over its actions. Public respect for and accountabiilty of a State requires that it be able to "administer its affairs within its own sphere" without "undue interference" by the federal government. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).[63]

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[61] The framers recognized the important distinction between Congress' regulation of private individuals and regulation of the States themselves. *See, e.g.*, I Farrand 34, 133 (Mason); *id.* 404 (Pinckney) (federal powers operate "upon the people, and not upon the States"); IV Elliot 163 (North Carolina Ratifying Convention) ("laws of Congress were to operate upon individuals, and not upon states . . . as the government was not to operate against states"); *see also id.* at 137.

[62] *See also* Note, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. Pa. L. Rev. 1460, 1480 (1981) ("Respect for the independent role of state governments in the federal system dictates that the state legislatures retain control over decisions affecting their ability to provide services for which they are considered responsible"); Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 Sup. Ct. Rev. 81, 107 ("The capacity of states to elicit participation in government depends in large part on their authority to organize and control the units of local government").

[63] State and local governments cannot assume the increased costs of federal regulation of financial decisions as central to their budgets as wage and salary decisions without raising local taxes or taking some other extraordinary action. Forty-two state constitutions in some way limit debt for state governments (some also limit debt for local governments); of these, 30 have debt prohibitions (with

Garcia offers no legitimate doctrinal basis for his effort to limit the immunity at stake in this case to states and not their political subdivisions. *National League of Cities* holds otherwise. 426 U.S. at 855 n.20. In fact, from colonial days on, the States have chosen to provide their traditional law enforcement and public service responsibilities identified in *National League of Cities* largely through their cities and political subdivisions. The Constitution thus presumes that in this, as in several other areas of constitutional law, *e.g.*, applications of the First, Fifth and Fourteenth Amendments, and the Privileges and Immunities Clause, the actions of local governments are encompassed along with the States'. Garcia's emphasis on evolving antitrust law doctrine is not relevant since what is at issue there is congressional intent; under a constitutional analysis, the federal interest advanced by the antitrust laws would present an entirely different question than does Congress' attempt to regulate the wages and overtime of state and local employees. For the constitutional purpose served by the immunity here, municipalities and other political subdivisions are clearly governmental entities which derive their power and definition from the States, and have long been delegated many of the state decisions and public service functions that the principles of federalism and the Tenth Amendment are intended to protect. Public mass transit systems, like public hospitals or police departments, may be provided by states, their political subdivisions or local

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exceptions allowing debt under some conditions) and 10 have debt ceilings, usually based on some formula which serves to limit debt to a given percentage of the value of taxable property in the State. *See* Appendix *infra*.

Almost half the States have explicit constitutional provisions that in some way mandate a balanced state budget. The most common method is simply to ban expenditures which are in excess of actual or anticipated revenue. Some States require that the legislature raise revenue sufficient to cover all appropriations, rather than limiting appropriations to available funds. *Id.*

governments. It would be senseless to extend limited immunity to only those systems that are owned by the States directly. Tremendous inequities would result if police, education or transit services provided directly by the States were immunized but not those provided by local governments.

B. There Are Essential Attributes Of State Sovereignty With Which The Federal Government May Not Interfere Without Threatening The Separate Existence Of The States.

To establish state immunity, it also must be shown that the federal regulation addresses "attribute[s] of state sovereignty," *National League of Cities*, 426 U.S. at 855, *Hodel*, 452 U.S. at 287, or "core state functions," *EEOC*, 103 S. Ct. at 1060. Since *National League of Cities*, this Court has repeatedly reaffirmed that state authority to determine the wages and overtime compensation of its employees is such a core state function.[64] That a State's ability to manage employment relationships is an essential governmental function, however, was well established before *National League of Cities*. James Madison, for example, recognized that in the system of federalism adopted by the Constitution the States retained certain "residuary and inviolable sovereignty."

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[64] *See EEOC*, 103 S. Ct. at 1061 n.11; *FERC*, 456 U.S. at 770. Contrary to the Solicitor General's assertion, U.S. Reply Br. 2-3, it is not the service provided, such as public schools, public libraries or public transit, that must be essential to state sovereignty; rather this Court recognized in *National League of Cities*, 426 U.S. at 845, and again in *EEOC*, 103 S. Ct. at 1016 n.11, that it is displacement of the State's policy choices determining the wages and overtime compensation for its own employees that is the core state function that must be protected. *National League of Cities* did not hold, for example, that the independent existence of a State is threatened if it does not provide public hospital, recreational or sanitation services. And *EEOC* did not consider whether the independent existence of Wyoming would be threatened if it could not have game wardens.

The Federalist No. 39, at 256 (J. Madison). He further noted that the "functionaries of the states are in their appointment and responsibility *wholly independent* of the United States," [65] and that "the component parts of the State Governments, *will in no instance* be indebted for their appointment to the direct agency of the federal government." [66]

That the States have special rights and responsibilities with respect to the selection, compensation and control of their officers and employees has long been recognized by this Court. *See Newton v. Board of County Commissioners*, 100 U.S. (10 Otto) 548, 559 (1880) ("[t]he legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. . . . And it may increase or diminish the salary or change the mode of compensation"); *see also EEOC*, 103 S. Ct. at 1077 n.5 (Powell, J., dissenting) ("the power to determine the terms and conditions of employment for the officers and employees who constitute a State's government . . . is as sovereign a power as any that a State possesses, and, it is far removed from the original concerns of the Commerce Clause"); *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042, 1051 (1983) (Blackmun, J., concurring and dissenting) ("The States have a sovereign interest in some freedom from federal interference when hiring state employees"). [67]

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[65] Letter from James Madison to Edward Everett (August 1830) (discussing opposition to nullification), in *The Complete Madison* 156 (S. Padover ed. 1973) (emphasis added).

[66] *The Federalist No. 45*, at 311-12 (J. Madison) (emphasis added).

[67] *See also Kotch v. River Port Pilot Commission*, 330 U.S. 552, 557 (1947) (important factor is "the right and power of a state to select its own agents and officers"); *Metcalf & Eddy v. Mitchell*, 269 U.S. at 522 ("employment of officers who are agents to administer its laws . . . [is] intimately connected with the necessary

By extending the FLSA to state and local governments, Congress targeted an essential attribute of state sovereignty—the State's decision about what it pays its own employees. Congress attempted to regulate these core state functions without consideration of less restrictive means of reaching its declared statutory goals of avoiding labor strife caused by substandard working conditions, and unfair competition in commerce.[68] The effect on the States of Congress' actions was the "forced relinquishment of important governmental activities," *National League of Cities*, 426 U.S. at 847, the imposition of "substantial costs," *id.* at 846, the "displacement of state decisions," *id.* at 849, and the disruption of "accepted [public] employment practices," *id.* at 850. Moreover, since wages and overtime compensation are usually established through longstanding and carefully defined collective bargaining arrangements, Congress has intruded into another state prerogative where the "propriety of local regulation has long been recognized." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970) (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 796

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functions of government . . ."); *Taylor v. Beckman*, 178 U.S. 548, 570-71 (1900) ("[i]t is obviously essential to the independence of the States, . . . that their power to prescribe the qualifications of their own officers, the tenure of their officers . . . should be exclusive, and free from external interference . . ."); *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 593-94 (1898) (policy of noninterference with state discipline of employee unless fundamental rights are involved); *Collector v. Day*, 78 U.S. at 126 (without the power of "the appointment of officers to administer their laws," the States could not "long preserve [their] existence"); *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415-16 (1850) (state's decision to reduce wages of canal commissioners involved "regulation of their internal and exclusive policy" which was not subject "to the tribunals and authorities of the federal government" under "the federal Constitution").

[68] *See* P. Brest, *Processes of Constitutional Decisionmaking: Cases and Materials*, ch. 10 (1975); *see also FERC*, 456 U.S. at 765, 769 n. 32.

(1945) (Douglas, J., dissenting)); *see also Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. at 27-28 (1982); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978); *id.* at 448 (Blackmun, J., concurring).[69]

In evaluating the extent to which federal regulation impairs an essential attribute of state sovereignty, the balancing of federal and state interests of which Justice

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[69] *National League of Cities* found that the FLSA imposed substantial displacement of state policy choices in structuring employment relationships. Such displacement would adversely affect local public transit agencies. Transit operators must respond to the local needs as they arise, in particular to morning and afternoon rush hours. Hours and length of day are structured with the requirements of particular routes clearly in mind. Numerous special premiums have evolved through years of negotiations to compensate public transit employees for their unique schedules and working hours. As one example, bus drivers may work between 6:00 a.m. and 10:00 a.m. and then again between 3:00 p.m. and 6:00 p.m. While they actually work only seven hours, they may receive premium compensation for hours worked after a spread of eleven hours, *i.e.*, from 4:00 p.m. to 6:00 p.m., or pay for a guaranteed eight hour day. Affidavit of Herbert J. Scheuer, Acting Vice President, APTA, ¶¶ 9-11, R. 25. Application of the FLSA fails to account for these premium arrangements and thus would substantially increase the rate and cost of overtime. *See* 29 U.S.C. § 207(e) (1982). Moreover, the FLSA also would require the maintenance of detailed records concerning employees, wages, hours and employment conditions, 29 U.S.C. § 211 (1982), 29 C.F.R. § 516 (1983), and impose penalties of back pay and liquidated damages for noncompliance. 29 U.S.C. § 216(c) (1982). *See* APTA Br. 20-21. In response to the substantial increase in employment compensation, the Solicitor General suggests that "management and labor [should] renegotiate existing premium pay arrangements" to conform to FLSA requirements, U.S. Supp. Br. 30 n.11, but this intrusion into the local governments' collective bargaining process is precisely the type of coercive regulatory intrusion (for no discernible public purpose) that *National League of Cities* sought to prevent. *See* 426 U.S. at 850 (criticizing "the effect of coercing the States to structure work periods . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation").

Blackmun spoke, 426 U.S. at 856, becomes relevant. As Justice Marshall noted in *Hodel*, the nature of the federal interest may justify state submission, even though an essential "attribute of state sovereignty" is impaired.[70] 452 U.S. at 288 & n.29. With respect to the FLSA, this balance has already been struck against federal intrusion. *Id.*; *see also LIRR*, 455 U.S. at 684 n.9. To apply this test, moreover, Congress must have made the federal objective clear so that the Court can weigh the respective federal and state interests in balancing the conflicting constitutional values at stake.[71] *See Fry*, 421 U.S. at 558 (Rehnquist, J., dissenting).

The federal interests in enacting the FLSA, as described by the Court in *Wirtz*, were to prevent labor

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[70] For Congress to override this central feature of a State's relationship with its employees, there must be a substantially more compelling national interest than the minimal "rational basis" test that the Constitution requires when Congress regulates private activity.

[71] The balancing of competing federal and state interests in Commerce Clause cases is not without ample precedent. For example, such a factual inquiry was undertaken in *Washington Revenue Department v. Association of Washington Stevedoring Cos.*, 435 U.S. at 748:

> Although the balancing of safety interests naturally differs from the balancing of state financial needs, . . . a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government. . . . All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.

See also Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Similarly, the Court regularly engages in such balancing of interests in the First Amendment area. *See Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).

strife such as strikes caused by substandard working conditions, and to preclude an unfair advantage in the public sector over private conduct of certain activities. 392 U.S. at 192. *See also* 29 U.S.C. § 202(a) (1982). The Solicitor General emphasizes that the federal interest in this case is "in preventing unfair competition in commerce." U.S. Reply Br. 7. These interests do not justify the application of federal wage and overtime compensation regulations to state and local governments. There is no allegation that state and local employees are paid substandard wages. Elected state decision-makers are accountable to the voters and subject to close scrutiny by the press; they are thus unlikely to provide their own employees with substandard working conditions. There is no evidence that federal regulation would reduce the prospect of strikes, particularly since many states have provisions outlawing strikes by public employees. Nor is there any merit to the Solicitor General's claim that application of the FLSA to the States would prevent some kind of unfair competitive advantage over private parties engaged in similar activities. *National League of Cities* correctly rejected such argument, 426 U.S. at 848-49. The general federal interest in "preventing unfair competition in commerce" clearly has no meaningful application to the employment policies of state and local governmental agencies which provide public services, heavily funded at the local taxpayers' expense, because such services cannot be provided profitably in the private sector. *See* APTA Br. 18-19.

The Court in this case should not presume, as the Solicitor General suggests, U.S. Supp. Br. 13-16, an implicit congressional determination that the federal interest is strong enough to outweigh the state interest; nor should this Court defer entirely to Congress on issues of federalism, as Garcia contends. G. Br. 34. In extending the FLSA to most employees of state and local governments after *Wirtz*, Congress acted on the strength of that decision, believing that it had comprehensive au-

thority to regulate state and local governmental activities without regard to limitations of constitutional federalism. Given Congress' reliance on a judicial decision subsequently overruled, this is a particularly strong case for judicial determination of the "competing claims of the states and the nation." U.S. Supp. Br. 16.[72] As the Chief Justice stated in *EEOC*: "While this theory [of judicial deference to Congress] may have some importance in matters of strictly federal concern, it has no place in deciding between the legislative judgments of Congress and that of [the State] Legislature. Congress is simply not as well equipped as state legislators to make decisions involving purely local needs." 103 S. Ct. at 1074 n.8. (Burger, C.J., dissenting).

C. Traditional Governmental Functions To Which State and Local Government Immunity Must Extend Are Readily Identifiable.

Under the *National League of Cities* test clarified in *Hodel*, the exercise of congressional commerce power is limited only if it impairs the States' ability "to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. The description of tradi-

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[72] Complete deference to Congress is inappropriate because members of Congress today are not selected to represent the interests of state and local government. *See* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Col. L. Rev. 847, 857-68 (1979); Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harv. L. Rev. 1871, 1885 (1976); *cf.* J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, ch. 4 (1980). They properly are preoccupied with national and international issues, expert in areas of committee assignment, and responsive to nationally organized interest groups, such as labor unions or business associations. Indeed, it is well recognized that the national legislative agenda is better served if members do not advocate insular, parochial views. Further, interests of particular states or localities often are not adequately uniform to command a majority in Congress.

tional governmental activities[73] and the examples used to illustrate them in *National League of Cities* suggest that the Court used this term as a means of identifying those governmental services that are pervasively provided by state and local governments in fulfillment of their local public health and safety responsibilities.[74] These traditional responsibilities have included preserving public safety and order through police and fire services and the maintenance of a transportation infrastructure, and protecting the public health through basic health and sanitation services.[75] The Solicitor General urges a rigid, static

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[73] In describing these protected governmental functions, *National League of Cities* used terms such as "integral," "important," and "traditional" interchangeably. *See, e.g.*, 426 U.S. at 847, 852, 855. It referred to "those governmental services which their citizens require," *id.* at 847, to areas that states "have regarded as integral parts of their governmental activities," *id.* at 854 n.18, to "governmental services which the States and their political subdivisions have traditionally afforded their citizens," *id.* at 855, and to activities that "are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851.

[74] The Court has used similar terms in the cases on intergovernmental tax immunity as a means of identifying governmental functions and services immune from federal taxation. *See Ohio v. Helvering*, 292 U.S. 360, 368 (1934) (tax immunity limited to "agencies which are of a governmental character"); *Helvering v. Powers*, 293 U.S. 214, 227 (1934) (tax applicable to the trustees of the temporarily quasi-publicly operated private street railway which was not a usual governmental activity); *see also New York v. United States*, 326 U.S. 572, 589-90 (1946) (Stone, C.J., concurring) (substituting test of "impair[ing] . . . the appropriate exercise of the functions of the government"); *Massachusetts v. United States*, 435 U.S. 444, 456, 458-59 (1978) (Brennan, J.) (immunity "necessary to protect the continued ability of the States to deliver traditional governmental services").

[75] *See The Federalist No. 45*, at 313 (J. Madison). *See also* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1173 (1977) ("deeply entrenched in the traditional and actual political practice of American federalism is an understanding that the task of providing certain important social services . . . is one that belongs chiefly to state and local governments. . .").

historical test to define what these traditional functions are at any given point in time, suggesting that the constitutionality of Congress' power be frozen at the time Congress attempts to use the power.[76] His proposal to straightjacket states by choices they made based on their communities' needs at earlier points in history is completely insensitive to the constitutional values at stake. It is, moreover, newly created out of whole cloth; it cannot be woven out of precedent. In fact, this Court has specifically rejected such a "static concept" of state and local government. *LIRR*, 455 U.S. at 686 ("[t]his Court's emphasis on traditional governmental functions . . . was not meant to impose a static historical view of state functions generally immune from federal regulation"); *New York v. United States*, 326 U.S. at 579 (Frankfurter, J.) ("It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune from federal taxation as were engaged in by the States in 1787. Such a static concept of government denies its essential nature").[77] The Solicitor General's suggestion

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[76] This test is fraught with inconsistencies and subjects constitutional values to the vagaries of the legislative process. Moreover, as the opinion of the court below makes clear, local public transit was pervasively provided by government before Congress attempted to regulate the way transit operators are compensated, the federal intrusion at issue here. *See* Appendix to Jurisdictional Statement for Federal Appellant ("U.S.J.S.") 6a-10a; APTA Br. 23-24, 27-35.

[77] *See* Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1034 (1977) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *see also Kusper v. Pontikes*, 414 U.S. 51, 63 (1973) (Blackmun, J., dissenting) (the Court's invalidation of a state voter registration requirement "fail[ed] to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them . . ."); *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967) ("Viable local governments may need many innovations, numerous

will not allow state and local governments to perform their traditional function of serving the needs of their community in changing times.[78]

In determining whether a particular activity of state and local government is a "traditional governmental function," the Court may look to various indicators, including the following:[79] (1) Is the service pervasively provided by state and local governments? (2) Do these gov-

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combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions.").

Innovative state legislation has provided the basis for federal legislation in a number of instances. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Col. L. Rev. 847, 854-55 (1979).

[78] Sometimes these needs require state performance of functions that the private sector formerly performed, but such a history does not preclude characterization of the function as a "traditional governmental function." "[I]t is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed." *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955). *See also* W. Wilson, *Constitutional Government in the United States*, 193-95 (1911); *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring):

> Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand what services and functions the public welfare requires.

[79] The Solicitor General attempts to provide authority for his novel historical test by citing cases where federal authority would have been limited if state immunity were applied in an area where the federal government previously legitimately operated. *See* U.S. Supp. Br. 19-21. As discussed in full in APTA's initial brief, APTA Br. 27-35, and as found by the court below, U.S.J.S. at 6a-10a, traditional federal statutory regulation would not be eroded if the FLSA is not applicable to state and local public transit agencies.

ernments provide the service to meet community-wide needs that cannot be met by the private sector? (3) Is the service supported by state and local taxpayers because it cannot be provided at a profit and cannot be abandoned?[80] (4) Do the states and cities regard this activity as an essential public service that is provided in furtherance of their traditional public health and welfare responsibilities? (5) Does the activity serve primarily local needs?[81] *See* APTA Br. 15-25. *Wirtz* was overruled in *National League of Cities* because there was no reasonable basis upon which to distinguish schools and hospitals from police, fire, recreation and the other governmental activities at issue in *National League of Cities*. States provide these public services for essentially the same reason that they provide mass transit services. 426 U.S. at 855; *see* APTA Br. 15-25.

Appellant Garcia apparently suggests that *Wirtz* be reinstated and that "traditional governmental functions" be limited to "the making and enforcement of laws," excluding the provision of all public services. G. Supp. Br. 41-43. This fragmented view of state and local government totally miscasts their fundamental responsibil-

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[80] Federal grant assistance, along with state and local tax revenues, often provides support for traditional governmental services, but this does not justify the imposition of the FLSA requirements where compliance is not an express condition of the grant which the States have voluntarily accepted. *See* APTA Br. 39-41; *see also Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. at 27 (Congress intended that public transit labor relations be governed by local law).

[81] It is not inconsistent with this standard to exclude from such protection activities that a particular State may undertake to operate as a business, to generate a profit, or to participate directly in a nationwide, federally regulated interstate system (*e.g.*, railroads or telephones). For useful guidelines articulated by the lower courts in evaluating what governmental services are traditional, see *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982); *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979).

ity in our system of constitutional federalism to meet the public health and welfare needs of local communities and ignores this Court's federalism precedent which embraces both administering the public law *and* furnishing public services. *See, e.g., Massachusetts v. United States*, 435 U.S. at 456 (Brennan, J.). States and their political subdivisions serve as providers of last resort, ensuring educational opportunity, access to health care, and mobility for all segments of the community. State and local budgets encompass these essential service needs which must compete with law enforcement agencies for scarce tax dollars. Indeed, law enforcement and essential public services are interrelated and interdependent. For example, if public transit services are curtailed, additional law enforcement officers are needed to manage increased traffic and the social consequences of higher unemployment. Appellant's implication that the States provide essential public services to compete in the private marketplace is misplaced, *see* APTA Br. 18-19; these services are provided to preserve public order and safety and healthful urban and rural communities. Such functions are inherently governmental; and in a federalist system, the principal responsibility for providing them is entrusted to state and local governments,[82] which ultimately

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[82] Office of Management and Budget, Executive Office of the President, *Major Themes and Additional Budget Details Fiscal Year 1983* at 121 (*"Primary responsibility for mass transit should remain with State and local governments. Decisions about service levels, equipment and facilities, fares, wage rates and management practices are better left to local decisionmakers"*) (emphasis added). If state and local legislative bodies are to remain accountable to their electorate for the decisions they make concerning the level and quality of services provided, the fees or fares charged, and the taxes leveled in support of governmental services, then they also must have the unimpaired capacity to set the wages and hours of the public employees who deliver these services. *See* Note, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. Pa. L. Rev. 1460, 1482 n.155 (1981) ("The critical question" is whether Congress or the states "will be faulted for an insufficient

are held accountable by their electorates for the quality and sufficiency of the services provided.

CONCLUSION

For the reasons stated herein, as well as in APTA's brief filed in the October Term, 1983, and the oral argument on March 19, 1984, this Court should affirm the court below.

Respectfully submitted,

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level or quality of service."). *See, e.g.*, Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1184 (1977) ("State 'sovereignty' . . . must be taken as a metaphor for its citizens' interests in the adequacy of the State['s] performance of its service functions."); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 Harv. L. Rev. 1065, 1090 (1977) ("When the federal government leaves to states and localities the fulfillment of the government duty, it cannot act so as to undermine the ability of the states and their subdivisions to perform that duty.").

APPENDIX

State Constitutional Debt Prohibition Provisions:

Ala. Const. art. XXIII, § 213; Alaska Const. art. IX, § 8; Ariz. Const. art. IX, § 5; Colo. Const. art. XI, § 1; Del. Const. art. VIII, § 3; Ga. Const. art. VII, § 4; Ill. Const. art. IX, § 9; Ind. Const. art. X, § 5; Iowa Const. art. VII, § 2; Ky. Const. § 49; La. Const. art. VII, § 6; Md. Const. art. III, § 34; Mass. Const. art. LXII; Mich. Const. art. IX, §§ 12-15; Minn. Const. art. XI, § 5; Mo. Const. art. III, § 37; Mont. Const. art. VIII, § 8; Neb. Const. art. XIII, § 1; N.M. Const. art. IX, § 8; N.Y. Const. art. VII, §§ 9-19; N.C. Const. art. V, § 3; N.D. Const. art. X, § 13; Ohio Const. art. VIII, § 1; Okla. Const. art. X, §§ 23-25; S.C. Const. art. X, §§ 5-6; S.D. Const. art. XIII, § 2; Tex. Const. art. III, § 49; Utah Const art. XIV, § 1; W. Va. Const. art. X, § 4; Wis. Const. art. VIII, § 5

State Constitutional Debt Ceiling Provisions:

Hawaii Const. art. VII, §§ 11-13; Idaho Const. art. VIII, § 1; Kan. Const. art. XI, § 6; Me. Const. art. III, § 34; Nev. Const. art. IX, § 3; N.J. Const. art. VIII, § 2, para. 1; Or. Const. art. XI, § 7; Pa. Const. art. VIII, § 7; Wash. Const. art. XIV, § 1; Wyo. Const. art. XVI, § 1.

State Constitutional Balanced Budget Provisions:

Col. Const. art. X, § 16; Fla. Const. art. VII, § 1; Ga. Const. art. III, § IX, para. IV; Hawaii Const. art. VII, § 8; Idaho Const. art. VII, § 11; Ill. Const. art. VIII, § 2; Kan. Const. art. XI, § 4; La. Const. art. VII, § 11; Md. Const. art. III, § 52 (5a); Mich. Const. art. IV, § 31; Mont. Const. art. VIII, § 9; Nev. Const. art. IX, § 2; N.J. Const. art. VIII, § 2, para. 2; Okla. Const. art. X, §§ 2, 23; Or. Const. art. IX, § 2; Pa. Const. art. VIII, § 12; S.C. Const. X, § 2; S.D. Const. art. XI, § 1; Tenn. Const. art. II, § 24; Tex. Const. art. III, § 49a; Utah Const. art. XIII, § 9; Wash. Const. art. VII, § 8; Wis. Const. art. VIII, § 5.

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Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ON REARGUMENT

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QUESTIONS PRESENTED

"[W]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), should be reconsidered?"

The parties previously briefed and argued the following two questions:

"1. Whether *National League of Cities* v. *Usery* . . . bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* [1982] ("FLSA") to the operations of San Antonio Metropolitian Transit Authority because it is performing an integral operation in an area of traditional governmental functions?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?"

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Appellees.

On Appeals From The United States District Court For The Western District Of Texas

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BRIEF OF SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ON REARGUMENT

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

This case results from a lawsuit filed by San Antonio Metropolitan Transit Authority ("SAMTA") seeking a declaratory judgment that the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA") are inapplicable to its operations under the decision in *National League of Cities* v.

Usery, 426 U.S. 833 (1976). On February 18, 1983, the district court entered summary judgment in favor of SAMTA and intervenor American Public Transit Association ("APTA"). The federal government and intervenor Joe Garcia[1] appealed directly to the Supreme Court, and the parties briefed and argued the two issues raised by the appeal. By Order entered July 5, 1984, the Court restored these consolidated cases to the calendar for reargument and requested the parties to brief and argue the question "[w]hether or not the principles of the Tenth Amendment as set forth in *National League* . . . should be reconsidered."

In its supplemental brief (p. 2), the Government endorses the Commerce Clause limitation in *National League* as being "sound and enduring constitutional doctrine . . . [which] is the necessary consequence of the federal structure of our constitutional system and fits comfortably within the context of this Court's decisions on other aspects of federal-state relations." The Government agrees that "the decision in *National League of Cities* manifests the 'essential role of the States in our federal system of government' " (br. 9) and then demonstrates that federalism, and its necessary limiting effect on the Commerce Clause, are a long-standing part of our constitutional jurisprudence. Although confirming the validity of the holding in *National League*, the Government renews its contention that the test for determining whether an activity is "traditional" should be "essentially, if not exclusively, an historical one." Gov't br. 17.

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[1] SAMTA originally opposed Garcia's intervention because, among other reasons, Section 16(b) of the FLSA, 29 U.S.C. § 216(b)(1982), extinguishes the right of any employee "to become a party plaintiff " to any action in which the Secretary has filed a complaint seeking to restrain further delay in payment of unpaid minimum wages or overtime compensation. See Plaintiff's Response in Opposition to Joe G. Garcia's Motion To Intervene, filed in the district court on April 23, 1980. The Government filed a counterclaim against SAMTA to restrain any further withholding of unpaid overtime compensation on February 1, 1980, which was more than two months before Garcia moved to intervene. Garcia's standing as an intervenor is accordingly not free of doubt.

Disagreeing with the Government, intervenor Garcia argues that "Congress' commerce clause power is not subject to *any* constitutional limits derived from state sovereignty" and that the reasoning in *National League* is faulty and should be overruled. Garcia br. 33-34 (emphasis added). Alternatively (br. 35-46), Garcia asserts that *National League* should be limited to "the making and enforcement of laws" and should not apply to political subdivisions of the States.

This brief is divided into two major parts. Part I concurs with the Government's position that principles of federalism, which pervade the fabric of the Constitution and are affirmatively stated in the Tenth Amendment, limit the scope of the federal commerce power when the States are regulated as States. Contrary to Garcia's flawed analysis of the historical underpinnings of our federalism, SAMTA shows that the writings of the Founders, as well as decisions of this Court which served as precursors to *National League*, and those which followed it, acknowledge federalism restraints on the Commerce Clause.

The second part of this brief is divided into three sections. First, SAMTA demonstrates that in *National League* the Court correctly applied principles of federalism by balancing the federal and state interests and holding that the FLSA's wage and hour provisions cannot be applied to most state and local government employees. Second, SAMTA shows that the Government's proposed historical test, and Garcia's claim that *National League* should be limited to law enforcement, draw no support from any decision of this Court and are aberrant notions, totally at odds with the well-documented principle that under the Constitution the States must have flexibility to respond to the evolving needs of their citizens. Third, SAMTA refutes Garcia's contention that *National League* should be inapplicable to local government, as being simply not supported by the decisions of this Court and disregarding the reality that the great majority of governmental services are provided by political subdivisions of the States.

Since SAMTA previously filed an extensive brief which demonstrates (1) that it is performing an integral operation in

an area of traditional governmental functions within the meaning of *National League* and (2) that the FLSA cannot be applied to *any* state or local government employees absent a constitutionally valid amendment, SAMTA has not rebriefed its position on those points, but instead respectfully refers the Court to its earlier brief.

ARGUMENT

I. The Holding in *National League*—That the Federal Government's Regulation of States as States Is Limited by Principles of Federalism and the Tenth Amendment—Is Consistent with the Founders' Intentions and Decisions of This Court Spanning More Than 150 Years.

In *National League*, the Court stated that it "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art I of the Constitution." 426 U.S. at 842. Garcia now contends that the Court's statement was patently erroneous and that it is clear from *The Federalist* and other indications from the Founders, as well as decisions from this Court, that there are no limitations on Commerce Clause regulation of the States as States. As shown below, Garcia's one-sided analysis is palpably erroneous.

A. *The Federalist* and Other Writings of the Founders Support the Holding in *National League*.

The Founders' clearest statement of federalism and state sovereignty is found in James Madison's frequently quoted essay in *Federalist No. 45:*

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which,

> in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

Id. at 313 (J. Cooke ed. 1961). Madison clearly envisioned distinct limits on the federal government's power to infringe on the States' broad authority over their internal affairs. This principle is echoed in other *Federalist* essays by Madison: "The local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere" (*No. 39*, at 256); "The States [are] regarded as distinct and independent sovereigns . . . by the Constitution proposed" (*No. 40*, at 261); "The States will retain under the proposed Constitution a very extensive portion of active sovereignty" (*No. 45*, at 310).[2]

The records regarding the Constitutional Convention affirm the federalism ideal that is our heritage. For example, Madison observed that the term "United States" was substituted for "National" "to guard against a mistake or misrepresentation of what was intended." III *The Records of the Federal Convention of 1787*, at 474-75 (M. Farrand ed. 1911) (hereinafter "*Farrand*"). C. Haines, in *The Role of the Supreme Court in American Government and Politics 1789-1835*, at 105-06 (1944), noted that "even the nationalistically inclined members of the Convention, such as James Wilson, asserted that it was not the intention of the Convention to destroy the sovereignty of the States." According to III *Farrand* 144, Wilson stated:

> [W]hen gentlemen assert that it was the intention of the federal convention to destroy the sovereignty of the States, they must conceive themselves better qualified to judge of the intention of that body than its own members, of whom not one, I believe, entertained so improper an idea.

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[2] *See also No. 59*, at 399-400 (Hamilton) ("Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments?").

Madison himself wrote that an object of the convention was "to draw a line of demarcation which would give the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them." III *Farrand* 132.[3]

Preservation of state sovereignty was uppermost in the Framers' minds. No one entertained any thought that the federal government could regulate the internal concerns of the States, operating as States, without limitation under the Commerce Clause. In *Federalist No. 45*, Madison reflected on the fact that the States had few, if any, concerns regarding the new federal power to regulate commerce:

> The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.

Id. at 314.

Had the Founders had any idea that the Commerce Clause bestowed unlimited authority to regulate the States as States, there would have been a major confrontation over the issue, and the Constitution probably would never have been pro-

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[3] *See also* W. Willoughby, *The Constitutional Law of the United States* vol. I at 111 (2d ed. 1929): "The Constitution looks to a preservation of the several States and the administrative autonomy that is allotted to them, and from this is deduced the principle that the Federal Government may not, unless it be absolutely necessary to its own efficiency, interfere with the free operation of State governments by way either of imposing upon them the performance of duties, or of unduly restraining their freedom of action by way of taxation or otherwise."

posed.[4] The apparent dearth of opposition and controversy over the Commerce Clause among the Founders is probably due in large part to the very limited purpose for which the power was to be enacted (which may account for the implication from Madison's statement above that the regulation of commerce was not one of the "more considerable powers"). Felix Frankfurter, in his treatise on *The Commerce Clause under Marshall, Taney & Waite* 12-13 (1937), highlighted the narrow purpose for the Commerce Clause:

> The records disclose no constructive criticisms by the States of the Commerce Clause as proposed to them . . . . The conception that the mere grant of the commerce power to Congress dislodged state power finds no expression . . . . It was an authorization to remove those commercial obstructions and harassments to which the militant new free states subjected one another, and to enable the community of the states to present a united commercial front to the world . . . .

The statements of the Founders support Justice Frankfurter's observations. Madison stated (III *Farrand* 478):

> [I]t is very certain that [the power to regulate commerce among the several States] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, *rather than as a power to be used for the positive purposes of the General Government* . . . . [emphasis added]

The same observation is confirmed in *Federalist No. 42*, at 283, where Madison stated that "a very material object of [the power to regulate commerce among the several states] was the relief of the States which import and export through other States, from the improper contributions levied on them by the

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[4] *Cf. EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1077 (1983) (Powell, J., dissenting): "It is impossible to believe that the Constitution would have been recommended by the Convention, much less ratified, if it had been understood that the Commerce Clause embodied the national government's 'central mission,' a mission to be accomplished even at the expense of regulating the personnel practices of state and local governments."

latter.").[5] *See generally* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 465, 471-81 (1941) (documenting the purpose of the Commerce Clause).

Two truths emerge from *The Federalist* and the other debates and writings chronicled above: First, the Founders unmistakably intended to preserve the sovereignty of the States in our fledgling nation. Second, they had no idea that the Commerce Clause would give the new federal government unlimited regulatory authority over internal commerce of the States, much less over the States as States.

Before discussing relevant Supreme Court precedents, it should be noted that the Founders envisioned the passage of a Bill of Rights that would include an amendment affirmatively preserving the sovereign rights of the States. *See* Casto, *The*

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[5] The limited purpose for the Commerce Clause has been recognized by this Court. *E.g.*, *South-Central Timber Dev., Inc.* v. *Wunnicke*, 104 S. Ct. 2237, 2242 (1984) ("[T]he Commerce Clause was designed 'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.' "); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("The very purpose of the Commerce Clause was to create an area of free trade among the several States."); *Mobile County* v. *Kimball*, 102 U.S. 691, 697 (1880) ("[I]t is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.").

The limited scope of the Commerce Clause with respect to commerce among the States is also reflected in decisions acknowledging that the federal power to regulate foreign commerce is broader. *E.g.*, *South-Central Timber Dev., Inc.*, 104 S. Ct. at 2247 ("It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."); *Japan Line, Ltd.* v. *Los Angeles County*, 441 U.S. 434, 448 (1979) ("Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be greater."); *Board of Trustees* v. *United States*, 289 U.S. 48, 57 (1933) ("The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.").

Doctrinal Development of the Tenth Amendment, 57 W. Va. L.Q. 227, 230-31, 248 (1949). In *Federalist No. 84*, at 578, Hamilton, although feeling a bill of rights was not needed, specifically presaged the fact that such a declaration of rights "under our constitution must be intended as limitations of the power to the government itself." *See also* 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 138 (J. Elliot 2d ed. 1896) ("*Debates*") (Spencer) (a "bill of rights . . . would keep the states from being swallowed up by a consolidated government"). The importance of the Tenth Amendment to the formation of our Nation is evidenced by the fact that all eight states that proposed amendments at the first Congress in 1789 recommended a provision reserving powers to the States, and no other amendment was proposed by as many states. II B. Schwartz, *The Bill of Rights: A Documentary History* 983, 1167 (1971).

B. The Principles of *National League* Are Supported by Supreme Court Precedent.

From our Nation's beginnings, this Court has had an almost unbroken line of cases recognizing that the States must be permitted to function within their spheres as sovereigns free from the tentacles of the Commerce Clause. Although in the depression era this Court began to reconsider earlier Commerce Clause principles that had limited regulation of the private sector, the Court, with one errant dictum exception,[6] has never retreated from the fundamental premise that principles of federalism protect the States from unjustified federal intrusion into their reserved realm. This part of the brief highlights some of these decisions, demonstrates that the handful of Supreme Court cases that have addressed Congress' regulation of the States as States are consistent with *National League*, and shows that the Tenth Amendment is not a meaningless appendage to the Bill of Rights.

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[6] *United States* v. *California*, 297 U.S. 175 (1936), discussed *infra* pp. 14-15.

One of the most frequently cited Commerce Clause cases is *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although that case emphasized the broad scope of the commerce power, it is consistent with *National League*. In *Gibbons*, the Court held that the power to regulate commerce "acknowledges no limitations, *other than are prescribed in the constitution.*" *Id.* at 196 (emphasis added). The Court gave dimension to its recognition that the Constitution restricts the commerce power when it acknowledged that the enumeration in the Commerce Clause "presupposes something not enumerated . . . the exclusively internal commerce of the state," which "may be considered as reserved for the state itself." *Id.* at 195.

Thirteen years later, in *Mayor of New York City* v. *Miln*, 36 U.S. (11 Pet.) 102 (1837), the Court again addressed the subject of federalism in a Commerce Clause context and concluded that the following are "impregnable positions":

> [T]hat a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation . . . are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.

Id. at 139. Although the holding in *Miln* has undergone a metamorphosis in modern decisions acknowledging that even purely intrastate and seemingly de minimus transactions in the private sector may affect commerce and be regulated under the Commerce Clause, it nevertheless forms part of our constitutional heritage and shows how the Court then viewed the parameters of the Commerce Clause.

Throughout the remainder of the Nineteenth Century, the Court continued to emphasize the role of federalism as a limit on the commerce power in our constitutional scheme. *E.g.*, *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 13 (1895); *Habeas Corpus Cases*, 100 U.S. 371, 394 (1879); *United States* v. *DeWitt*, 76 U.S. (9 Wall.) 41, 44 (1869); *License Cases*, 46 U.S. (5 How.) 504, 574, 588 (1847). Federalism restraints on the tax power also became evident during this era, which, although since modified to apply only to direct taxation of the States, continues to this very day.[7] This doctrine was foreshadowed in *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71 (1869), where the Court stated:

> [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.
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> . . . .
>
> [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. . . .

Id. at 76.

The dawn of the Twentieth Century saw continued statements from this Court underscoring our federalism and its relation to the federal commerce power. *See, e.g.*, *Employers' Liability Cases*, 207 U.S. 463, 502-03 (1908) (quoted *infra* p. 26); *see also South Carolina* v. *United States*, 199 U.S. 437, 451-52 (1905) ("Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government . . . . In other words, the two governments, National and state, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers . . . .").

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[7] A discussion of the tax immunity cases, and their support of similar restrictions on the Commerce Clause, is contained in Part I(C) of this brief, *infra* p. 19.

In the 1930's, the Court's respect for federalism continued to be evident. For example, in *United States* v. *Butler*, 297 U.S. 1 (1936), the Court stated:

> Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that *any power* granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible states,") might be served by obliterating the constituent members of the Union.

Id. at 77 (emphasis added). Similar statements appeared in *Brush* v. *Commissioner*, 300 U.S. 352, 364 (1937) and *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 78 (1938).

In 1936, the Court began an era of deference to acts of Congress regulating the means of production in the private sector. In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld the National Labor Relations Act. The Court emphasized, however, that it was not abandoning the concept of federalism carefully embodied in the Constitution by the Founders:

> Undoubtedly, the scope of [the commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.

Id. at 37. Subsequently, in *United States* v. *Darby*, 312 U.S. 100 (1941), the Court sustained the FLSA, which like the NLRA applied only to the private sector.[8]

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[8] Although the Court opined that the Tenth Amendment "states but a truism," *id.* at 124—a statement disavowed in *National League* and which this brief (*infra* pp. 17-19) shows to be unsound—the Court acknowledged

Although the decision in *Darby* apparently marked the end of the private sector's ability to rely on concepts of federalism to avoid federal Commerce Clause regulation, federalism was far from dead. *See, e.g., H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525, 533-34 (1949) ("desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs . . . . There was no desire to authorize federal interference with social conditions or legal institutions of the states."); *Duckworth* v. *Arkansas*, 314 U.S. 390, 394 (1941).

Just five years before *National League* was decided, the Court reemphasized the preeminent role of federalism in the abstention case of *Younger* v. *Harris*, 401 U.S. 37, 44-45 (1971):

> The National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . . It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

The cases discussed above dealt with the role of federalism in the private sector. Although Garcia cites a handful of pre-*National League* commerce or war power cases in which a state or local government was a party, they do not support Garcia's claim that federal commerce power over the States is limitless. With the exception of *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which *National League* expressly overruled, all of these cases involved instrumentalities (railroads, rivers, lakes or commercial water terminals) forming an integral part of interstate or foreign commerce, or they dealt with federal legislation directed at the national emergencies of war or inflation.

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that the only regulations of commerce within the plenary power of the Commerce Clause are those "which do not infringe some constitutional prohibition . . . ." 312 U.S. at 115.

The first such case—which, significantly, did not come until 137 years after our Nation was formed—was *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925). There, the United States sued to enjoin diversion of water from Lake Michigan in excess of the amount authorized by the Secretary of War. The Government claimed that diversion would affect the levels of the Great Lakes and connecting rivers and obstruct interstate navigation. The Court noted that the case also involved the federal government's treaty obligations to a foreign power, as well as obstructions to foreign commerce, *id.* at 425, which is subject to greater federal regulation than is commerce among the States (see n.5, *supra*). The Court did not hold that the Commerce Clause was unlimited, but instead balanced the federal and state interests, finding the federal interest in interstate navigation and foreign commerce to be paramount.

Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941) also dealt with the need for uniform federal control over interstate navigation. In that case, Oklahoma challenged a federal law permitting the United States to build a dam and reservoir on the river that formed the boundary between Texas and Oklahoma. In upholding the law, the Court noted that the project was "part of a comprehensive flood-control program for the Mississippi itself" and that Congress was "protecting the nation's arteries of commerce through control of the watersheds." *Id.* at 525. The case did not involve federal regulation of the States' sovereign functions. In fact, the opinion was written by Justice Douglas, who dissented in *Maryland* v. *Wirtz*.

The Supreme Court has also upheld Commerce Clause regulation of publicly owned water terminals and railroads, which were essential components of interstate or foreign commerce. In the *Railroad Cases*,[9] the Court sustained application of federal statutes to state-owned railroads. Despite the dic-

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[9] *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936).

tum in *United States* v. *California* regarding the scope of commerce power over the States, all three cases dealt with state activities that were part of the interstate rail network, which was singled out for special treatment in *UTU* v. *Long Island Rail Road*, 455 U.S. 678 (1982). In *California* v. *Taylor*, 353 U.S. at 566, the Court stressed that the railroad in question was "a vital link in the National transportation system." In *United States* v. *California*, 297 U.S. at 182, the Court emphasized that the railroad "serves as a link in the through transportation of interstate freight . . . ."

In *California* v. *United States*, 330 U.S. 577 (1944), the Court sustained application of a statute to state-owned terminals along the commercial waterfront in San Francisco. In validating the statute, the Court relied on the fact that the terminals were "an essential part of interstate and foreign trade." *Id.* at 586. Thus, not only were the terminals a direct instrumentality of interstate commerce, but they were being regulated under Congress' admittedly unlimited power to regulate foreign commerce.

Case v. *Bowles*, 327 U.S. 92 (1946), also relied upon by Garcia, was not a Commerce Clause case, but arose under the war power, which is one of the federal government's most formidable powers, as shown by the following excerpt from *Federalist No. 45* (Madison):

> The operations of the Federal Government will be most extensive and important in times of war and danger; those of the State Governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State Governments will here enjoy another advantage over the Federal Government.

Id. at 313. Furthermore, the legislation in *Bowles* was temporary.

In *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court sustained the enterprise concept of FLSA coverage enacted by Congress in 1961[10] and also validated extension of the FLSA to

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[10] The lynchpin of the enterprise concept is set out in section 3(s) of the Act, 29 U.S.C. § 203(s)(1982), which defines the term "enterprise engaged in commerce or in the production of goods for commerce," which in turn estab-

public schools and hospitals. Notwithstanding its ruling, however, the Court left its door ajar for future federalism challenges to Commerce Clause regulation directed at the States when it stated that "[t]he Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' " *Id.* at 196.

Seven years later, in *Fry* v. *United States*, 421 U.S. 542 (1975), the Court made clear that the States may be protected from federal commerce regulation that improperly impairs their reserved sovereign authority. The Court stated:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," [quoting *United States* v. *Darby*], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

421 U.S. at 547 n.7. Although the Court upheld application of the Economic Stabilization Act to the States, its reasoning and approach are consistent with the later decision in *National League*. Unlike the FLSA, the Stabilization Act was temporary, having expired shortly after the Court granted certiorari. 421 U.S. at 549 (Douglas, J.). Furthermore, the Act was in response to a national emergency caused by rampant inflation, and, as noted in *National League* (426 U.S. at 853), it had minimal impact on the States. Careful review of the *Fry*

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lishes the prerequisites for enterprise coverage by the Act's minimum wage and overtime provisions. The statutory definition of this phrase specifically includes enterprises having "employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person." Section 3(s)(6), enacted in 1974, includes all such employees if they work for a public agency—*i.e.*, state or local government. This broad test of enterprise coverage would encompass virtually all public employees, since it would be hard to imagine any employee in this modern age who does not "handl[e] . . . or otherwise work[ ] on goods or materials" that have moved in commerce. Even state legislators "handle" pencils that have crossed state lines.

opinion suggests that the Court had anticipated the balancing test mentioned by Justice Blackmun in *National League* and, after balancing the federal interest to be advanced by the Stabilization Act against the States' interest in being free from its operation, decided that the interest of the federal government was greater.

The statement in *Fry* about the Tenth Amendment was not novel exposition and, unlike the "truism" comment in *Darby*, it was faithful to the constitutional scheme. Over 150 years before *Fry*, the Court stated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819), that the "10th Amendment . . . leav[es] the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument." The Court thus acknowledged that the Tenth Amendment is not without meaning and also laid the framework for the development of a constitutional doctrine of federalism based upon the fabric of the entire Constitution rather than the Tenth Amendment alone.

The Tenth Amendment's vitality is also evident from other cases. In *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920), Justice Holmes referred to "invisible radiation from the general terms of the Tenth Amendment . . . ." In *McCray* v. *United States*, 195 U.S. 27, 61 (1904), the Court concluded that "undoubtedly, both the Fifth and Tenth Amendments qualify . . . all the provisions of the Constitution . . . ." In *Kansas* v. *Colorado*, 206 U.S. 46, 90-91 (1907), the Court emphasized that "[t]his Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning." *See also United States* v. *Butler*, 297 U.S. 1, 68 (1936).

The Tenth Amendment is one of only twenty-six amendments enacted in almost 200 years. To relegate it to a useless and meaningless appendage would contravene sound principles of constitutional construction dating back to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). There, Chief

Justice Marshall stated that "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect . . . ." *Accord, Wright* v. *United States*, 302 U.S. 583, 588 (1938); *see also Ullmann* v. *United States*, 350 U.S. 422, 428-29 (1956) ("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."); Casto, *The Doctrinal Development of the Tenth Amendment*, 57 W. Va. L. Q. 227, 228-29 (1949) (also noting that later-enacted provisions to the Constitution prevail as implied modifications of former provisions).

The principle that the Tenth Amendment modifies the Commerce Clause is supported by cases holding that other amendments in the Bill of Rights affirmatively limit the commerce power. *National League* cited cases under the Fifth and Sixth Amendments to this effect. 426 U.S. at 841. Only last term, in *FCC* v. *League of Women Voters*, 104 S.Ct. 3106 (1984), this Court struck down a federal ban on editorializing by noncommercial educational stations. The Court held that the statute, even though based on the Commerce Clause, violated the First Amendment. The Court ruled that because "broadcasters are engaged in a vital and independent form of communicative activity, . . . the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *Id.* at 3116. The activities of state and local governments in providing essential services to their citizens are even more "vital and independent," and therefore the Tenth Amendment must also "inform and give shape to the manner in which Congress exercises its regulatory power" over the States. *See also Fry* v. *United States*, 421 U.S. at 553 (Rehnquist, J. dissenting) ("[A]n individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground that it infringes his rights under, say, the First or Fifth Amendment, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress. That the latter claim is of greater force, and may succeed when the former will fail, is well established.").

Even if there were no Tenth Amendment, the validity of *National League* would be unaffected, since the principles of federalism implicit in the Constitution singularly limit the Commerce Clause when Congress attempts to regulate the States as States.[11] For example, in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 406, 421, the Court stressed that federalism disputes "depend on a fair construction of the whole" Constitution and that federal laws must be consistent with the "spirit of the constitution." Justice Blackmun eloquently stated this principle in his dissenting opinion in *Nevada* v. *Hall*, 440 U.S. 410 (1979):

> I would find that source [for Nevada's sovereign immunity] not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism. The Court has had no difficulty in implying the guarantee of freedom of association in the First Amendment . . . and it has had no difficulty in implying a right of interstate travel . . . .
>
> I have no difficulty in accepting the same argument for the existence of a constitutional doctrine of interstate sovereign immunity. . . . The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention. . . . *It is, for me, significantly fundamental to our federal structure to have implicit constitutional dimension.*

Id. at 430 (emphasis added); *cf. Roe* v. *Wade*, 410 U.S. 113, 152-54 (1973) (tracing the history of the right of privacy as implicit or at least having "roots" in various amendments to the Constitution).

C. *National League* Is Supported by the Tax Immunity Decisions.

Since at least 1870, when *Collector* v. *Day*, 78 U.S. (11 Wall.) 113, was decided, this Court has recognized that Congress' constitutional tax power is subject to federalism limitations. In

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[11] Furthermore, the Tenth Amendment, regardless of its substantive meaning, ensured that the federal judiciary would have full authority to review and overturn improper federal encroachments on the States. *See* E. Corwin, *Court Over Constitution* 54-55 (1957).

National League (426 U.S. at 843-44), the Court drew analogous support for its holding from the tax immunity cases. These cases are derived from the same principles of federalism articulated in *National League*, and they buttress the Court's holding in that case.

This principle of federalism was cogently expressed in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931), as follows:

> It is an established principle of our constitutional system of dual government . . . that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective sphere and from the provisions of the Constitution which look to the maintenance of the dual system.

Although the decisions that invalidated federal income taxation of employees and agents of state and local governments were overruled in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939),[12] the federalism limitation on federal taxation of the States as States continued. *Graves* made clear that it was only overruling the tax immunity principle as applied to the private sector: "where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed." 306 U.S. at 483. Seven years later, in *New York* v. *United States*, 326 U.S. 572 (1946), six justices (four concurring and two dissenting) affirmed that the tax immunity doctrine remained viable as

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[12] At page 29 of his brief, Garcia maintains that "the *only* federal taxes Congress has ever enacted that this Court has found to be unduly intrusive on state sovereignty were taxes on the income of state employees . . . ." This statement is inaccurate. In *Indian Motocycle*, the Court invalidated an excise tax on a motorcycle bought by a city. *See also Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (invalidating net income and excess profits tax on corporate oil and gas lease income); *National Life Ins. Co.* v. *United States*, 277 U.S. 508 (1928) (invalidating tax on municipal bonds held by insurance companies).

applied to the States as States: "a federal tax which is not discriminatory . . . may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." 326 U.S. at 587 (Stone, C. J., concurring). *See also South Carolina* v. *Regan*, 104 S. Ct. 1107 (1984), in which the Court recently asserted original jurisdiction in a suit filed by South Carolina challenging the constitutionality of a federal tax law.

The tax immunity cases are directly apposite to the holding in *National League*. Both powers are found in the same article of the Constitution, and except for a restriction on taxing exports, there are no explicit constitutional limitations on the federal power to tax, just as there are none on the power to regulate commerce. This was emphasized by Justice Frankfurter in *New York* v. *United States*, 326 U.S. at 575:

> By its terms the Constitution has placed only one limitation on [the federal tax] power . . .: Congress can lay no tax "on Articles exported from any State." Art. I, § 9. Barring only exports, the power of Congress to tax "reaches every subject."

Justice Frankfurter then equated the tax power and commerce power by proclaiming that "[s]urely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce." *Id.* at 582. *See also McCray* v. *United States*, 195 U.S. 27, 61 (1904) ("The right of Congress to tax within its delegated power [is] unrestrained, except as limited by the Constitution . . . .").

In *United States* v. *Baltimore & Ohio Railroad*, 84 U.S. (17 Wall.) 322 (1872), the Court stated that if the agencies and instrumentalities of the States "may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed . . . ." *Id.* at 327-28. The same admonition applies to Commerce Clause regulation of the States, which due to its now virtually limitless scope may

impede, and possibly even destroy, the essential functions of state and local government.[13]

D. The Holding in *National League* Has Been Consistently Reaffirmed in Subsequent Supreme Court Decisions.

This Court has repeatedly acknowledged the continued vitality of the *National League* doctrine and has reaffirmed its guiding principle that Congress does not have unlimited power to apply the Commerce Clause to the States as States.

In *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), the Court, through Justice Marshall, reaffirmed *National League* and established a three-pronged test for determining whether a Commerce Clause statute violates principles of federalism. *Id.* at 286-93. The Court rejected a Tenth Amendment challenge to the federal statute under scrutiny because "in contrast to the situation in *National League*, the statute at issue regulates only 'individual businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside.' " *Id.* at 293 (quoting *National League*). In the companion case of *Hodel* v. *Indiana*, 452 U.S. 314 (1981), the Court, again speaking through Justice Marshall, upheld the same federal statute against a Tenth Amendment challenge, emphasizing that the statute regulated "private individuals and businesses" rather than "the States as States," and concluded that "[t]his Court's decision in *National League of Cities* simply is not applicable . . . ." 452 U.S. at 330.

In *UTU* v. *Long Island Rail Road*, 455 U.S. 678 (1982) ("*LIRR*"), the Court, in an opinion by Chief Justice Burger, upheld application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce. The entire decision was premised upon the continued viability of *National League*, which the Chief Justice characterized as meaning "that under most circumstances federal power to regulate commerce could

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[13] The tax immunity rationale has also been applied to the bankruptcy power. *See Ashton* v. *Cameron County Water Improv. Dist. No. 1*, 298 U.S. 513, 532 (1936).

not be exercised in such a manner as to undermine the role of the states in our federal system." *Id.* at 686.[14]

In *FERC* v. *Mississippi*, 456 U.S. 742 (1982), in an opinion by Justice Blackmun, the Court denied a Tenth Amendment challenge to a federal statute that imposed requirements on the States with respect to the regulation of utilities. The majority opinion "acknowledge[d] that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty [quoting *National League*] . . . [and that] having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 761. The opinion also confirmed the continued validity of *National League* and the Tenth Amendment. *Id.* at 763, 769, 770 nn.28, 32, 33. Justice Powell's opinion, concurring in part and dissenting in part, noted that "as the structure of the Court's opinion today makes plain . . ., the Commerce Clause and the Tenth Amendment embody distinct limitations on federal power." *Id.* at 773.

In *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), the Court, in an opinion by Justice Brennan, held that "the Age Discrimination in Employment Act ["ADEA"] does not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.' " *Id.* at 1062.[15] In reaching

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[14] As shown in SAMTA's opening brief (pp. 17-29), publicly owned mass transit systems are entitled to *National League* immunity since, unlike railroads, transit is not part of a national transportation network requiring uniform regulation, transit has not been subject to comprehensive and long-standing federal regulation but instead has been traditionally regulated by the States, and state and local government are the principal providers of transit—furnishing 94% of all transit services. Furthermore, unlike the railroad in *LIRR*, which had operated under the Railway Labor Act for 13 years without objection, SAMTA never acceded to FLSA coverage.

[15] Although not relying on the Fourteenth Amendment as a basis for its ruling in *Wyoming*, the Court has consistently held that the States enjoy no federalism immunity from federal discrimination legislation passed pursuant to that Amendment. *E.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 178-79 (1980); *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 690 n.54 (1978); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

this conclusion, the Court underscored the validity of the holding in *National League*. The majority stated that "some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment." *Id.* at 1061 n.11. The Court referred to the "wide-ranging and profound threat to the structure of State governance" portended by the FLSA in *National League* and distinguished the ADEA on the ground that comparable interference was lacking in the case before it. *Id.* at 1062-63. The Chief Justice, in a dissenting opinion joined by Justices Powell, Rehnquist and O'Connor, summarized the import of *National League*, *Hodel* and *LIRR*: "The wisdom to be drawn from these cases is that Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment." *Id.* at 1069. *See also White* v. *Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042, 1051 (1983) (Blackmun, J., concurring and dissenting) (quoted p. 31 *infra*); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.10 (1980) ("[c]onsiderations of sovereignty independently dictate that marketplace actions involving 'integral operations in areas of traditional governmental functions'—such as the employment of certain state workers—may not be subject even to congressional regulation pursuant to the commerce power"); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 15 (1977) ("[A] State 'continues to possess authority to safeguard the vital interests of its people.' ").

The foregoing cases demonstrate that in the eight years following *National League* this Court has continued to apply the principles of *National League*, refining and clarifying them as it encountered new situations, and that acceptance of Garcia's assertion that there are no federalism limits on the Commerce Clause would constitute a remarkable about-face by the Court.

E. An Unlimited Commerce Power Is a Formula for Destruction of the States as Governing Authorities in Modern Society.

In 1790, three years after the States ratified the new Constitution, our nation was an agrarian society in which 95% of the population lived in rural areas. Bureau of Census, U.S. Dep't of Commerce, *Historical Statistics of the United States, Colonial Times to 1970*, ser. A 57-72, at 12 (1975) ("*Historical Statistics*"). The predominantly rural nature of America continued through the Nineteenth Century and into the early 1900's, when urbanization finally took hold.[16] In 1980, 74% of the population were urban dwellers. Bureau of Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1984*, at 27, tab. 26 (1983) ("*Statistical Abstract 1984*").

With the urbanization of America and the technological innovations that have overcome the vast distances separating our states and cities, has come the realization that what affects commerce in the Twentieth Century is far removed from the early days when the horse and buggy predominated. Concurrently, this Court has so significantly expanded the Commerce Clause in the private sector that today practically any activity, no matter how local or confined, is within the reach of the federal commerce power. Any doubt about this proposition is dispelled by *Wickard* v. *Filburn*, 317 U.S. 111 (1942), in which the Court held that wheat grown by a farmer for consumption on his farm was subject to a federal quota system enacted under the Commerce Clause. *See also Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).[17]

In view of the broad reading that Congress and this Court now give to the Commerce Clause, practically any activity

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[16] In 1850, 85% of Americans still lived in rural areas, *Historical Statistics*, ser. A 57-72, at 12, and by 1900, the figure was still 60%, *id.* at 11. By 1920, the figure had dropped to 50% and by 1940 to 40%. *Id.*

[17] That Congress construes its Commerce Clause authority as being boundless and touching the most local of activities is evident from the 1974 amendments to the FLSA which extended that Act to persons "employed in domestic service in a household." 29 U.S.C § 206(f) (1982).

performed by the States and any decision made by the States could be found by Congress to affect commerce and subjected to federal regulation. If the commerce power were not limited by the Tenth Amendment and principles of federalism, the States would be "downgrad[ed] . . . to a role comparable to the departments of France, governed entirely out of the national capitol." *Elrod* v. *Burns*, 427 U.S. 347, 375 (1976) (Burger, C. J., dissenting). With such unlimited authority, Congress could dictate to the States how many policemen should be on the streets of our cities, and what type of shoes they should wear. It could tell the States what materials to use in building their capitols; it could decree the number of fire stations and their locations; it could dictate the routes that urban transportation systems must traverse and their hours of operation. The list could go on indefinitely. Such a scenario is beyond the wildest imaginings of the Founders or any decision of this Court.

Such plenary and potentially destructive exercise of federal regulation of the States as States would be unprecedented. In *United States* v. *Butler*, 297 U.S. 1, 77 (1936), the Court said:

> The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.

Similar concerns were voiced in the *Employers' Liability Cases*, 207 U.S. 463, 502-03 (1908):

> It is apparent if the contention [that to engage in interstate commerce is a privilege available only on conditions Congress prescribes] were well founded, it would extend power of Congress to every conceivable subject, however inherently local, would obliterate all the limita-

> tions of power imposed by the Constitution and would destroy the authority of the States as to all conceivable matters which from the beginning have been and must continue to be, under their control so long as the Constitution endures.[18]

"There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If the Commerce Clause were unlimited, the federal government, through regulation, could foreclose much experimentation, and many states might refrain from trying novel approaches for fear that Congress would obliterate the fruits of their labor in the name of the Commerce Clause. *See also* Institute for Studies in Federalism, *Essays in Federalism* 13 (1961) ("[M]ost of the so-called 'new' policies of the federal government had been tested and sifted at state and local levels. Without the autonomy of states and without, in the states, substantial local freedom, such controlled experimentation could not exist.").

As noted in SAMTA's opening brief (at pp. 29-33), this Court has treated the Constitution as a living document with flexibility to adapt to new situations. "The great clauses of the Constitution are to be considered in the light of our whole experience, and not merely as they would be interpreted by its Framers in the conditions and with the outlook of their time." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 15-16 (1977). Consistent with this principle, the Court has upheld Commerce Clause legislation that was undoubtedly beyond the contemplation of the Founders, and thereby gave that power

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[18] *See also EEOC* v. *Wyoming*, 103 S. Ct. at 1081 (Powell, J., dissenting) (under view that commerce power is unlimited, "it is not easy to think of any state function—however sovereign—that could not be preempted"); *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) ("power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government into a central government of unrestrained authority over every inch of the whole Nation").

meaning commensurate with realities of the Twentieth Century. Since principles of federalism and the Tenth Amendment also form a part of the Constitution, they must be interpreted and applied consistent with the same realities. Justice Holmes emphasized this point in *Missouri* v. *Holland*, 252 U.S. 416 (1920):

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in light of what was said a hundred years ago. . . . *We must consider what this country has become in deciding what [the Tenth] Amendment has reserved.*

Id. at 433-34 (emphasis added). This principle is also evident from Hamilton's comments in *Federalist No. 34*, at 210, that "Constitutions of civil Government are not to be framed upon a calculation of existing exigencies; but upon a combination of these, with the probable exigencies of ages, according to the natural and tried course of human affairs."

The United States today is a highly industrialized, highly urbanized country. The States, and particularly the cities and other local government units, constantly encounter new problems, as well as new versions and degrees of old problems, while their citizens demand more and more services that are unavailable privately. As public revenues fail to keep up with needs, state and local governments are called upon more and more frequently to devise new solutions to their problems. This is "what this country has become," and this is what must be considered in construing the Tenth Amendment and principles of federalism. In this modern age, where state and local governments are the domestic lifeblood for hundreds, if not thousands, of diverse urban centers with their own peculiar

needs, it is unthinkable that the Commerce Clause could be used to regulate the States as States without limitation.[19]

II. The Court in *National League* Correctly Held That the FLSA Cannot Be Applied to State and Local Government Employees Engaged in Integral Operations in Areas of Traditional Governmental Functions.

A. The Court, in Balancing the Federal and State Interests in the Wage and Hour Policies of State and Local Government, Properly Struck the Balance in Favor of the States.

In *National League*, the Court considered the question whether "the States' power to determine the wages" they will pay their employees, "what hours those persons will work, and what compensation will be provided . . . [for overtime] are

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[19] Without citing any case where this Court has declined to adjudicate a federalism dispute, Garcia argues that such questions should be left to the political process. Such an unprecedented suggestion shakes the very foundation of our constitutional form of government. The Founders clearly envisioned that the federal judiciary would be the final arbiters in disputes between the States and the federal government over the constitutionality of federal statutes. *E.g.*, *Federalist No. 39* (Madison) at 256 ("in controversies relating to the boundary between the two jurisdictions [state and federal], the tribunal which is ultimately to decide, is to be established under the general Government"); *Federalist No. 78* (Hamilton) at 524 (courts' duty "must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."); *see also* IV *Debates* 485 (Van Buren) ("Not only are the acts of the national legislature subject to [the Supreme Court's] review, but it stands as the umpire between the conflicting powers of the general and state governments.").

Perhaps the most famous exposition on the justiciability of conflicts between federal law and the Constitution is reflected in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). There the Court noted that "in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but only those which shall be made in pursuance of the constitution, have that rank." *Id.* at 180. The Court concluded that "it is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177, and that the proposition "[t]hat a case arising under the Constitution should be decided without examining the instrument under which it arises . . . is too extravagant to be

'functions essential to separate and independent existence. . . .'" 426 U.S. at 845.[20] The Court observed that the FLSA "directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose" and noted that "[t]his congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs." *Id.* at 849. The Court stated that the FLSA will "significantly alter or displace the States' abilities to structure employer-employee relationships in . . . areas . . . typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851, and concluded that "Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made," *id.* at 855.

Justice Blackmun joined the majority's opinion and elaborated upon his understanding that the Court "adopt[ed] a balancing approach . . . ." *Id.* at 856. Under this approach, the federal interest in FLSA regulation was balanced against the state interest in being free to make essential employment decisions. SAMTA submits that *National League* properly concluded that the balance tips in favor of the States.[21]

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maintained." *Id.* at 179. *See also INS* v. *Chadha*, 103 S. Ct. 2764, 2779 (1983); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871) ("the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress"). Compelling evidence of the invalidity of Garcia's argument comes from the wealth of cases cited in this brief in which this Court *has* exercised its jurisdiction to resolve federalism challenges to acts of Congress.

[20] As noted in SAMTA's opening brief (p. 15 n.10), the Court's "separate and independent existence" test is irrelevant in determining whether an *activity* is traditional, but rather goes to the question whether the particular federal regulatory scheme unconstitutionally impairs state choices that are essential to separate and independent existence.

[21] As shown in SAMTA's opening brief (p. 16 n.11), the balancing test is used only to weigh the federal interest in the particular legislation under scrutiny against the state interest. It plays no role in determining whether

Before analyzing these interests, it should be noted that since *National League* this Court has reaffirmed the validity of its holding that Congress cannot constitutionally prescribe minimum wages and overtime compensation for state and local government employees. For example, in *EEOC* v. *Wyoming*, 103 S. Ct. 1054, 1062 (1983), the Court relied upon *National League's* finding that application of the FLSA to the States "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking . . . [which] portend[ed] [a] wide-ranging and profound threat to the structure of State governance." In *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982), the Court cited *National League* for the proposition "that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty," and then remarked that "[i]ndeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *See also White* v. *Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042, 1051 (1983)(Blackmun, J., concurring and dissenting)("The States have a sovereign interest in some freedom from federal interference when hiring state employees.").[22]

1. The States' Interest.

National League accords proper constitutional deference to the role of state and local governments in America today. It cannot be gainsaid that a principal role of state and local

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an activity—*e.g.*, fire, police or transit—is an integral operation in an area of traditional governmental functions.

[22] The holding in *National League* that policy choices regarding wages and hours of state and local government employees is an attribute of sovereignty was foreshadowed by earlier decisions. *See Taylor* v. *Beckham*, 178 U.S. 548, 570-71 (1900) ("It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference . . . ."); *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 547 (1869) ("It may be admitted that the reserved rights of the States, such as the right to . . . employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress.").

governments is to "deliver[] . . . those governmental services which their citizens require." *National League*, 426 U.S. at 847. One need only walk through the streets of our cities to realize the immense burden thrust upon state and local governments in satisfying the demands of their citizens. The States provide protection from crime and disasters; they educate their young; they provide health care for their poor; they tend to the need for sanitation; they provide parks and recreational facilities for use by everyone; and—as in this case—they furnish inexpensive, tax-subsidized mass transit services so that people can go to work and school and attend to their other basic needs.

The stark reality that the obligation to furnish most governmental services to local citizenry has fallen upon the shoulders of state and local governments is evident from the fact that they outspend the federal government on domestic programs.[23] The crucial role of state and local governments in providing public services is also shown by the fact that the number of state and local government employees is more than four times the number of federal civilian employees. *Statistical Abstract 1984*, at 303, tab. 487 (showing that in 1982, there were approximately 13.1 million state and local government employees and 2.9 million federal civilian employees).[24]

No one can contest the fact that in choosing the wage rates and overtime policies that will prevail for their employees, state and local governments are "mak[ing] . . . fundamental . . . decisions" that are part of the "quintessential attribute of sovereignty." *FERC* v. *Mississippi*, 456 U.S. at 761. *See also*

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[23] For example, in 1977, state and local governments made 70% of all direct expenditures for domestic governmental purposes. Advisory Comm'n on Intergov't Rel., *State and Local Roles in the Federal System* 6 (1982).

[24] That state and local government would assume this role is logical in the natural order of human experience. *See Federalist No. 17* (Hamilton) at 107: "Upon the same principle that a man is more attached to his family than to his neighbourhood, to his neighbourhood than to the community at large, the people of each State would be apt to feel a stronger byass towards their local governments than towards the government of the Union . . . ." *See also* 1 McQuillin, *Law of Municipal Corporations* 45 (3d ed. 1971).

EEOC v. *Wyoming*, 103 S. Ct. at 1077 n.5 (Powell, J., dissenting)("the power to determine the terms and conditions of employment . . . is as sovereign a power as any that a State possesses . . . ."). The only way a state can fulfill its fundamental duty to provide services for its citizens is by employing a force of people to deliver the services. Without a workforce, no service—fire, police, transit—could be provided to anyone, and the States would essentially be hollow shells. In hiring and retaining employees, and in allocating their financial resources in the manner they deem most prudent, state and local governments must carefully fashion wage rates and overtime policies that best suit their unique needs and are consistent with their budgetary resources.

The amount of state revenues spent on payroll underscores the importance of local decisionmaking in setting wage and hour policies. In *National League*, it was undisputed that 80% to 85% of state and local government budgets are used for payroll. See Opening Brief of National League of Cities 11; Transcript of Oral Argument (Apr. 16, 1975) 21-22. Application of the FLSA to state and local governments would directly impair their ability to make policy choices regarding the allocation of the great bulk of their financial resources. Such far reaching interference with the essentials of state sovereignty strikes at the very foundation of a state's ability to fulfill its role in the Union by delivering the services that its citizens require.

The States have always been accorded wide latitude in making such policy choices. In *Federalist No. 33*, at 204, Hamilton queried "[w]hat is a power, but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution?" In *Federalist No. 34*, at 209, he observed that "there can be no color for the assertion, that [the States] would not possess means, as abundant as could be desired, for the supply of their own wants, independent of all external control." Hamilton also emphasized that the essential ingredient in any effective government is revenue; in *Federalist No. 31*, at 196, he said,

> Revenue is as requisite to the purposes of the local administrations as to those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. It is therefore as necessary, that the State Governments should be able to command the means of supplying their wants, as, that the National Government should possess the like faculty, in respect to the wants of the Union.

In *National League*, the Court concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented." 426 U.S. at 851. This statement was in keeping with the major thrust of the Court's decision—that the infirmity of the FLSA amendments covering state and local government employees is that they "directly supplant[] the considered policy choices of the States' elected officials" and in effect "forbid such choices . . . ." *Id.* at 848. In *EEOC* v. *Wyoming*, the Court elaborated on this point and observed that the question of impact addressed in *National League* is an "inquiry, essentially legal rather than factual, into the direct and obvious effect of the federal legislation on the ability of the States to allocate their resources." 103 S. Ct. at 1063. According to the Court, the concern in *National League* was not only with present effects, "but also with the *potential* impact of [the] scheme on the States' ability to structure operations and set priorities over a wide range of decisions." *Id.* at 1062 (emphasis added).

Although the decision in *National League*, as well as the briefs filed by the appellants in that case, dramatically illustrate the tremendous effect the FLSA portended for state and local governments, it is more significant that the FLSA's application would straightjacket state and local governments with federally imposed requirements, thereby foreclosing their future ability to structure essential services by making changes in wage and hour policies, as local needs dictate.[25] Furth-

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[25] As reflected in SAMTA's opening brief (p. 15 n.9), it would be extremely difficult to limit drivers to 8-hour shifts "without seriously disrupting service to transit passengers." Peak passenger loads require shifts that range from 8 hours to 8 hours 45 minutes. Due to geographical, traffic and other conditions, schedules simply cannot be designed around an 8-hour shift, just as

ermore, attempts to increase the burdens of the FLSA, although unsuccessful in the past, may prevail in the future, thereby imposing even more crippling obligations on state and local governments. A stunning example of this is a bill that was introduced in the House of Representatives in 1983. In stages, it would have lowered the workweek from 40 to 32 hours for purposes of the overtime obligation, would have required the payment of overtime at double the regular rate and would have prohibited the scheduling of daily shifts of more than 20% of the statutorily mandated regular workweek without the consent of the worker. H.R. 1784, 98th Cong., 1st Sess., 129 Cong. Rec. H775 (1983). By a very conservative estimate, this bill, if enacted, would cost state and local governments at least $16 billion in added payroll costs just for the extra pay employees would receive for working a regular 40-hour workweek.[26] This does not include the substantial additional dollars state and local governments would have to pay for hours worked in excess of 40. Under the bill, employees would have the power to dictate when overtime would be worked and ultimately to restrict their availability to shifts of 6 hours 24 minutes! Such an encumbrance could bring essential governmental services to a standstill.[27]

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exigencies of city life prevent 8-hour scheduling for fire and police services. If SAMTA were forced to conform its operations to the FLSA-mandated 40-hour workweek, the routes and schedules that have been carefully designed and adjusted to accommodate local conditions would require substantial restructuring. Some routes would be dropped; others shortened. Local decisionmaking would succumb to federal regulation.

[26] This estimate was based upon a conservatively assumed average hourly rate for state and local government employees of $6.00 and the further assumption that at least half of all state and local government workers would not be exempt from the FLSA under the white collar exemption for executive, administrative and professional employees. If each employee worked only 40 hours per week, he would be entitled to an additional $6.00 per hour for the eight hours of overtime worked per week, or $2,496.00 more per year. This latter figure, when multiplied times half of the 13,071,000 state and local government employees, *Statistical Abstract 1984*, at 303, tab. 487, produces a figure of more than $16.3 billion.

[27] Other bills to increase the burdens of the FLSA include H.R. 3652, 98th Cong., 1st Sess., 129 Cong. Rec. H5633 (1983) (increasing the minimum wage to $4.15 per hour); H.R. 1784, 97th Cong., 1st Sess., 127 Cong. Rec.

The current financial distress of state and local governments also must be considered. Although demands for new and improved governmental services have increased, local government's ability to finance these services has not kept pace. The situation has been compounded by the federal government's recognition that most government services are properly the responsibility of state and local governments and by its withdrawal of funding. The current dilemma of local government was noted in Gold, *Recent Developments in State Finances*, 36 Nat'l Tax J. 1 (1983):

> State government finances have ridden a rollercoaster during the post-World War II period. First came an enormous multi-decade expansion, which ended in the mid-1970's. This boom was followed by an unprecedented tax-cutting spree in the wake of Proposition 13. We are currently in a third period, one marked by widespread fiscal stress and tax increases. While the outlook for the remainder of the 1980s is fraught with uncertainties, it is clear that states will be playing a more prominent role in our federal system as the federal government pulls back from domestic responsibilities it had assumed over the past two decades.

The proposed federal budget for 1985 reinforces the foregoing observation, for there the Government continued its plan to reduce funding to such local responsibilities as transit, education and sewage treatment. Office of Mgm't & Budget, Exec. Office of the President, *Major Themes & Additional Budget Details Fiscal Year 1985*, at 195, 317, 341-42, 353 (1984).

News journals are replete with stories about the economic woes of our states and cities. For example, the February 14, 1983 issue of *U.S. News & World Report* recites that in New York City "6,300 job slots are being abolished, including 1,000 for police officers and 262 for street cleaners. Officials concede

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H414 (1981) (reducing the workweek for overtime purposes to 35 hours, requiring overtime compensation at double the regular rate and prohibiting mandatory overtime); H.R. 1784, 96th Cong., 1st Sess., 125 Cong. Rec. 1666 (1979) (same); H.R. 11784, 95th Cong., 2d Sess., 124 Cong. Rec. 8001 (1978) (same); H.R. 10130, 94th Cong., 1st Sess., 121 Cong. Rec. 32655 (1975) (boosting required overtime pay to two and one-half times the regular rate).

the reductions will mean dirtier and perhaps less secure streets." *Id.* at 88. The November 28, 1983 edition of the *Wall Street Journal* reports on a National League of Cities' survey in which half of the responding cities replied that they "plan to reduce services this year to pare anticipated deficits" and that "[a]bout 35% expect to reduce municipal employment." *Id.* at 20, col. 2. The September 12, 1983 issue of *U.S. News & World Report* stated that "more than three quarters of the states trimmed 1983 budgets" and that "[n]ineteen states withheld cost-of-living pay raises from employees." *Id.* at 12. The litany of similar articles could go on for pages, and they all would underscore the axiom that the ability of local governments to make their own policy choices in deciding how to spend the 80% to 85% of revenues that are used for payroll purposes is an essential of sovereignty that cannot be impaired by the federal government without jeopardizing, or destroying completely, the integrity of the States.

2. The Federal Interest.

The discussion above, and the text of the *National League* decision and its progeny, demonstrate beyond peradventure that the ability of state and local governments to determine their own wage and hour policies is a "core state function," *see EEOC* v. *Wyoming*, 103 S. Ct. at 1060, which is not only an attribute of sovereignty, but an indispensable component of sovereignty. The federal interest in regulating the wages and hours of state and local government employees withers in comparison to the States' preeminent interest in making their own wage and hour decisions.

Maryland v. *Wirtz*, 392 U.S. at 189-93, shows that Congress had two reasons for adopting the enterprise concept of FLSA coverage, pursuant to which state and local governments were subjected to the FLSA in 1974. One purpose was to eliminate unfair competition; the other was to prevent labor strife. Neither purpose is furthered in any significant way by applying the FLSA to state and local governments.

Significant competition simply does not exist between the public and private sectors with respect to activities encompas-

sed by *National League*.[28] For example, SAMTA is the only urban mass transit system in the San Antonio area. In furnishing a service that is subsidized by local taxes and which the private sector is unable to provide, SAMTA is in competition with no one. Furthermore, even if state and local governments could be considered in competition with the private sector—for example, the police department with private security services—federal regulation of wage and hour policies would not affect the competitive situation. Most essential governmental services are heavily subsidized by local tax dollars, and the States could not realistically raise user charges to the levels of the private sector since this would deprive millions of poor Americans of services essential to their health and welfare. State and local governments are, after all, the last resorts of the poor.

The second purpose for FLSA coverage—elimination of labor strife—similarly has little applicability to state and local governments. Most of the Fifty States prohibit strikes by public employees. *See* Council of State Governments, *Book of the States 1982-83*, at 318-19, tab. 4 (1982). The States accordingly have developed their own method of dealing with labor strife, which substantially lessens any federal interest to be served by "congressionally imposed displacement of state decisions . . . ." *National League*, 426 U.S. at 849. Although illegal strikes are not unknown in the public sector, the States have the capability to handle these matters on their own through disciplinary and legal proceedings, just as the federal government was able to handle the air controllers' illegal strike.

As recognized in *National League*, "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce." 426 U.S. at 854. Although the elimina-

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[28] In fact, activities in which there is substantial competition would probably not be eligible for *National League* immunity since the service provided would be one that the private sector was fully capable of providing as a business enterprise and which therefore would not constitute an "integral operation in areas of traditional governmental functions."

tion of labor strife and unfair competition may be valid reasons to apply the FLSA to the private sector, they simply do not measure up to the compelling need for state and local governments to retain flexibililty in making those fundamental decisions that form the "quintessential attribute of [their] sovereignty."

B. The "Historical" Test Proposed by the Government, and Garcia's Claim That the Tenth Amendment Only Protects the "Enactment and Enforcement of Laws," Are Untenable.

1. The Government (br. 17) contends that the test for *National League* immunity "should be essentially, if not exclusively, an historical one." With one added twist discussed below, the Government merely reiterates the argument it made in its opening brief—that sovereign state functions can be no greater than those historically engaged in by the States.

As SAMTA's opening brief emphasized (pp. 29-33), the Government's historical test would shackle the States to the antiquated world of our forefathers, depriving the States of their ability to make policy choices and structure their activities to meet the changing needs of an evolving society. Not only is the Government's test repugnant to this Court's rejection in *LIRR* of a "static historical view of functions generally immune from federal regulation," 455 U.S. at 686, but it also violates the fundamental principle that ours is a living constitution—one which acknowledges that " '[v]iable local government may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions.' " *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978).

The Government cites no case in which this Court has ever endorsed an historical test in determining which local government activities are insulated from federal regulation. In footnote 6 on page 20 of its supplemental brief, the Government claims that in *New York* v. *United States*, 326 U.S. 572 (1946), "the historical standard appeared to represent the consensus of the Court." This statement is patently erroneous. No mem-

ber of the Court espoused a doctrine that would so hamstring the States. In fact, Justice Frankfurter emphatically expressed the contrary position when he stated the "we decide enough when we reject limitations . . . derived from such untenable criteria as . . . *historically* sanctioned activities of government . . . ." *Id.* at 583-84 (emphasis added). The dissenting justices also shunned a static historical test. *Id.* at 591, 596. In the final analysis, support for the Government's definition of "traditional" is derived solely from its unsupported refrain that it means "historical."

In its supplemental brief (p. 21), the Government has modified its historical test slightly by arguing that Tenth Amendment immunity should be denied "where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area." This arbitrary test finds no support in the decisions of this Court and bears no rational relation to the basic purpose for federalism—protection of the States' "integrity [and] their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975). That the federal government has generally regulated the private sector in the past affords no basis for depriving state and local governments of the flexibility to structure their activities to meet the changing needs of their citizens.

The untenable nature of the Government's position is particularly evident when one considers that the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1982), which was passed in 1935, governs the labor relations practices of virtually all private sector employers, regardless of the type of activity involved.[29] *See* SAMTA's opening brief at 22. Under the Government's historical abstraction, one could argue that no activity which was not "well established as a common governmental function" by 1935 would ever be eligible for Tenth Amendment immunity since by that date the federal government had undertaken to regulate labor relations throughout

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[29] As the court below noted, the NLRA has always exempted the States and their political subdivisions. Gov't J.S. 9a.

the private sector. Such an inflexible standard, one that is more out of step with sound constitutional construction, is hard to imagine. If the Tenth Amendment can arbitrarily be frozen as of 1935, then why not place it in suspended animation as of 1787, when Congress was first vested with power to regulate commerce? Any such suggestion, of course, would be unprecedented since "none would concede that the sovereign powers of the States were limited to those which they exercised in 1787." *New York* v. *United States*, 326 at 596 (Douglas, J., dissenting).

The Government (p. 28) also contends that if its historical test is not adopted, "questions of constitutionality of federal legislation affecting the states would be open to continual judicial reexamination . . . ."[30] The Government fails to realize that an enlightened judiciary responsive to changing conditions is the very essence of our constitutional jurisprudence. This Court is regularly called upon to reexamine earlier decisions and to construe legislation and governmental practices in light of present realities. This is evident in the Eighth Amendment cases discussed in SAMTA's opening brief (p. 30 n.26) and perhaps is best reflected in this Court's landmark decision, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), where the Court discarded its predecessors' conceptions of equal educational opportunities and held that it "must consider public education in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492-93. If the Court were precluded by static historical concepts from harmonizing constitutional jurisprudence with the changing face of America, we would be saddled with archaic rulings from years long passed. *Compare, e.g., Plessy* v. *Ferguson*, 163 U.S. 537 (1896) *with Brown* v. *Board of Education*, 347 U.S. 483 (1954); and *Pace* v. *Alabama*, 106 U.S. 583 (1882) *with McLaughlin* v. *Florida*, 379 U.S. 184, 189-90 (1964) *and Lov-*

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[30] The Government also maintains that the Court should defer to Congress the task of periodically reviewing the federal laws to determine whether statutory change is warranted. Such a rule would amount to abdication of this Court's fundamental responsibility "to say what the law is," *Marbury* v. *Madison*, 5 U.S. at 177, and "to declare all acts contrary to the manifest tenor of the constitution void," *Federalist No. 78* (Hamilton) at 524.

ing v. *Virginia*, 388 U.S. 1 (1967). As eloquently put in *Hurtado* v. *California*, 110 U.S. 516, 529 (1884), "to deny every quality of the law but its age, and to render it incapable of progress or improvement . . . would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

The Government (br. 27-28) repeats the same erroneous argument from its opening brief: that the FLSA was constitutional under *National League* standards when it first was made applicable to certain public transit systems in 1966 because the States supposedly had not generally undertaken to provide transit services by that date, or by 1961, when the FLSA was extended to certain private (but not public) systems. As noted in SAMTA's opening brief (pp. 24 n.17, 28, 35), by 1965, 56% of all transit workers in the United States were employed by publicly owned systems. Furthermore, APTA's opening brief (p. 23 & n.30) shows that long before 1965, many of the nation's larger cities had public transit systems. In San Antonio, the transit system has been publicly owned since 1959.

2. Garcia's contention that *National League* should be limited to the making and enforcement of laws would relegate state and local governments to the role of police states whose sole sovereign duty would be to pass laws and compel obedience. The absolute invalidity of this contention is evident from the Founders themselves. In *Federalist No. 45*, Madison stated that "[t]he powers reserved to the several States will extend to *all* the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the States." *Id.* at 313 (emphasis added). In the same paper, Madison declared that "the states will retain under the proposed Consitution a *very extensive* portion of active sovereignty . . . ." *Id.* at 310 (emphasis added). In *Federalist No. 34*, Hamilton emphasized that states "possess means, *as abundant as could be desired*, for the supply of their own wants, independent of all external control." *Id.* at 209 (emphasis added). *National League* itself stressed that state sovereignty encom-

passes the "dual functions of administering the public law *and furnishing public services.*" 426 U.S. at 851 (emphasis added).

That the furnishing of services is protected by federalism and the Tenth Amendment is underscored by the fact that police protection—which Garcia would exempt—is itself a service. Although Garcia has attempted to support his ill-conceived limitation with statistics showing expenditures for public schools and hospitals (br. 39-40), the same observations can be made about law enforcement. During 1981-82, state and local governments spent approximately $27.8 billion on "police protection," "correction," and "protective inspection and regulation." Bureau of Census, U.S. Dep't of Commerce, *Governmental Finances in 1981-82*, at 33, tab. 11 (1983). This was equivalent to the $29.6 billion they spent on hospitals, and was substantially higher than the $14.9 billion spent on sanitation (including sewerage), $6.9 billion on fire protection, $7.4 billion on parks and recreation, and $10.7 billion on public health; the greatest expenditures were for education, highways and public welfare. *Id.* During the same period, state and local governments spent $11 billion on mass transit. *Id.* at 61, tab. 19.[31]

3. SAMTA's opening brief demonstrated in detail that publicly owned transit systems must be exempt under *National League*, whether immunity is measured under the guidelines of *LIRR*, or through comparison of transit with other activities exempted in *National League*, or on the reality that transit is an integral component of the traditional activity of providing and maintaining streets and highways for public transportation, or on the fact that the States regard transit as an integral part of their governmental activities. Another way to determine what is traditional is by considering whether the particular activity could be effectively provided by the private sector if state involvement ceased and whether the States engage in the activity for profit. This test is consistent with previous decisions of this Court.

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[31] As noted in SAMTA's opening brief (pp. 33-34), Congress has on several occasions emphasized the reality that transit and other vital services are as essential as police protection.

In *South Carolina* v. *United States*, 199 U.S. 437 (1905), the Court held that the federal government could exact license taxes on state-owned liquor stores. The Court noted that the liquor business was operated for profit, *id.* at 454, and concluded that the tax immunity doctrine "is limited to those ["state agencies and instrumentalities"] which are of a strictly governmental character, and does not extend to those which are used by the state in the carrying on of an ordinary private business." *Id.* at 461. This same rationale is evident in *Allen* v. *Board of Regents*, 304 U.S. 439 (1937), in which the Court ruled that the federal government could impose a tax on athletic events held at publicly owned universities. The Court held that the "immunity implied from the dual sovereignty recognized by the Constitution does not extend to business enterprises conducted by the States for gain." *Id.* at 453.

In *New York* v. *United States*, 326 U.S. 572 (1946), the Court held that the federal government can tax mineral waters sold by the state. Justice Frankfurter noted that "there is a constitutional line between the State as government and the State as trader . . . [and] 'if a state *chooses* to go into the business of buying and selling commodities, . . . the exercise of [that] right is not the performance of a governmental function'. . . ." *Id.* at 579 (emphasis added). The Court also remarked that the state was "engaged in a business enterprise in which the State sells mineral waters in competition with private waters." *Id.* at 581.

The principle that the Tenth Amendment does not protect state activities that are for profit or which can be effectively provided by the private sector has received recognition in recent decisions of this Court. In *Employees* v. *Missouri Department of Public Health & Welfare*, 411 U.S. 279, 284 (1973), the Court, in extending Eleventh Amendment protection to a state hospital, noted that such hospitals "are not operated for profit . . . ." Subsequently, in *Edelman* v. *Jordan*, 415 U.S. 651, 695 (1974), Justices Marshall and Blackmun, dissenting, stated that "in launching a profitmaking enterprise, a 'State leaves the sphere that is exclusively its own.' " (quoting *Parden* v. *Terminal Railway*, 377 U.S. 184, 196 (1964)). A similar rationale appears in Chief Justice Burger's concurring opinion

in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 418 (1978), in which he stated that "[t]his case turns, or ought to, on the District Court's explicit conclusion . . . that '[t]hese plaintiff cities are engaging in what is clearly a business activity . . . in which a profit is realized.' "[32] Further support for this test appears in the dissenting opinion of Justices Powell, Brennan, White and Stevens in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980): "[o]ne distinction between a private and a governmental function is whether the activity is supported with general tax funds . . . or whether it is financed by the revenues it generates." *Id.* at 452 n.3. The opinion distinguished "integral operations in areas of traditional governmental functions" where the "Commerce Clause is not directly relevant" from situations where the "State enters the private market and operates a commercial enterprise." *Id.* at 449-50.

By focusing on whether an activity is operated for profit and whether it could be effectively provided by the private sector if the States withdrew, the Court gives due recognition to the flexibility state and local governments need in order to deliver "those governmental services which their citizens require." *National League*, 426 U.S. at 847. At the same time, the federal and state governments are afforded a workable yardstick from which to measure the limits of federal Commerce Clause power over the States.

As documented in SAMTA's opening brief, publicly owned mass transit systems are clearly entitled to *National League* protection under this standard. Urban mass transit services

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[32] In *Lafayette*, the Chief Justice observed that "a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause." 435 U.S. at 422. As SAMTA's opening brief (p. 27 n.23) shows, this quotation apparently was in reference to common carriers by rail. The decision in *LIRR* demonstrates that railroads—which are part of the national rail system requiring uniform regulation, which have been subject to comprehensive federal regulation for more than a century, and which have not traditionally been subject to state regulation—are a unique subject for Commerce Clause regulation. Certainly, neither transit nor any of the activities mentioned in *National League* are part of a national network, nor have they been subjected to comprehensive federal regulation, while all have traditionally been regulated by the States.

are provided almost exclusively by the public sector.[33] Transit is heavily subsidized by local taxes and is not operated for profit, but instead exists as one of the essential services necessary to the health and well-being of our urban areas—a service which would not exist if the States did not provide it.

C. Political Subdivisions Cannot Be Separated from the States for Purposes of the Tenth Amendment.

In *National League*, the Court expressly extended FLSA immunity to the States and their political subdivisions. 426 U.S. at 855 n.20. Garcia maintains that *National League* should apply only to state governments and should not embrace their political subdivisions. The Government does not join in this contention. As shown below, it is without merit.

In most areas of constitutional jurisprudence, this Court has treated the States and their political subdivisions identically for purposes of the Tenth Amendment. For example, in *United States* v. *Baltimore & Ohio Railroad*, 84 U.S. (17 Wall.) 322 (1873), a tax case, the Court made clear that a city, like a state, is entitled to federalism protection against overreaching federal legislation:

> A municipal corporation like the city of Baltimore is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state.

Id. at 329. A similar rationale was articulated by the Court in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 577 (1930) in which the Court invalidated a federal tax assessed

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[33] SAMTA is not suggesting that an activity must be within the exclusive domain of state and local governments. All of the activities listed in *National League*, including even police protection, have analogs in the private sector. However, no one could assert that the private sector would be able to step in and provide these services if the States were no longer involved. For example, if state and local governments closed all public schools, millions of Americans, particularly the poor, would go without an education. Similarly, if the States eliminated mass transit as one of the services they provide, transit would become a relic of the past because the private sector simply cannot provide transit services profitably.

against the City of Westfield on the purchase of a motorcycle. Other cases involving the federal tax power have reached similar results. *E.g.*, *Brush* v. *Commissioner*, 300 U.S. 352 (1936)(salary of chief engineer for city bureau of water supply not taxable); *Willcuts* v. *Bunn*, 282 U.S. 216, 225 (1930)(tax on obligations of state's "political subdivisions falls within the constitutional prohibition as a tax upon the exercise of the borrowing power of the state"); *National Life Insurance Co.* v. *United States*, 277 U.S. 508, 521 (1928)("United States may not tax state or municipal obligations"). The same principle was followed in invalidating a federal bankruptcy statute, as applied against a political subdivision of the State of Texas. *Ashton* v. *Cameron County Water Improvement District No. 1*, 298 U.S. 513, 527-28, 532 (1936). Similarly, in *Gilman* v. *City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1866), the Court quoted the Tenth Amendment and held that the City of Philadelphia had the right, notwithstanding the provisions of the Commerce Clause, to construct a bridge across a navigable river for the public convenience.

The Court has also consistently held that the States and their political subdivisions are covered by other parts of the Constitution. *See, e.g.*, *United Building & Construction Trades Council* v. *Mayor of Camden*, 104 S. Ct. 1020, 1026 (1984) (Privileges and Immunities Clause); *Waller* v. *Florida*, 397 U.S. 387, 392, 395 (1970)(Fifth and Fourteenth Amendments); *Avery* v. *Midland County*, 390 U.S. 474, 479-81 (1968) (Equal Protection Clause); *Schneider* v. *Town of Irvington*, 308 U.S. 147, 160 (1939)(First and Fourteenth Amendments); *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U.S. 207, 216-17 (1903) (Contract Clause).

The wisdom of not distinguishing between the States and their political subdivisions for Tenth Amendment purposes—particularly where a statute, such as the FLSA, regulates employment policies—becomes particularly evident when one considers that the great majority of governmental services in the United States are furnished by the political subdivisions of the States. In 1982, there were 82,290 political subdivisions in

the Fifty States.[34] *Statistical Abstract 1984*, at 272, tab. 447. During the same year, the States and their political subdivisions had a combined total of 13,071,000 employees, of which 3,747,000 (28.7%) worked for state governments, and 9,324,000 (71.3%) worked for local government. *Id.* at 303, tab. 487. With regard to police protection—which Garcia would exempt under *National League*—state and local governments had 599,000 such employees, of which 524,000 (87.5%) worked for local government. *Id.* at 304, tab. 489. These figures show that restriction of *National League*'s principles to state governments would place the great majority of policy choices regarding wages and hours for public employees beyond the pale of the Tenth Amendment and would essentially eviscerate the Court's holding.

The only authorities cited by Garcia for his novel suggestion arose under the Eleventh Amendment or the federal antitrust laws. Neither line of cases warrants a change in *National League*. The Eleventh Amendment merely precludes private suits in federal courts against "one of the United States." At best, it only indirectly protects a state from the effects of federal legislation, and it does not relate to the power of the federal government directly to control the internal operations of "the States and their political subdivisions . . . in . . . deliver[ing] those governmental services which their citizens require." *National League*, 426 U.S. at 847.

Antitrust cases, such as *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), are likewise inapposite. In *Boulder*, the Court held that a city did not enjoy antitrust immunity under the "state action doctrine" for a city ordinance that restrained competition among cable television companies. The question in *Boulder* is not remotely similar to the issue in *National League*—the extent to which the federal government can regulate essential services of state and local governments. In fact, the case upon which *Boulder* was premised, *City of*

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[34] Texas alone had 4,192 political subdivisions. Tex. Advisory Comm'n on Intergov'tl Rel., *Trends in Texas State & Local Government Finance* 35 (1984).

Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), stated that it was "difficult to see how *National League of Cities* is even tangentially implicated." *Id.* at 412 n.42.

Even if the *Boulder* rationale were applicable to the Tenth Amendment principles in *National League*, SAMTA would meet the test. In *Boulder*, the Court held that a political subdivision enjoys antitrust immunity if it is engaged in "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. . . ." 455 U.S. at 52. SAMTA provides urban mass transit services by mandate of the State of Texas. *See* Tex. Rev. Civ. Stat. Ann. arts. 1118x, 6663b, 6663c (quoted in part in the Appendix to SAMTA's opening brief). In fact, under article 1118x, § 3(a), the principal city in a metropolitan area is required "to institute proceedings to create a rapid transit authority" if 5000 qualified voters file a petition. Section 6A then requires that services be extended to adjoining areas upon vote of their residents.

CONCLUSION

SAMTA respectfully submits that the judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOE G. GARCIA,

Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF AMICI OF THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, 12 OF ITS STATE AFFILIATES, AND THE CITY OF EUGENE, OREGON IN SUPPORT OF APPELLEES

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v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF AMICI OF THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, 12 OF ITS STATE AFFILIATES, AND THE CITY OF EUGENE, OREGON IN SUPPORT OF APPELLEES

INTEREST AND DESCRIPTION OF AMICI CURIAE

This Brief *Amici Curiae* in support of Appellees is submitted on behalf of the National Public Employer Labor

Relations Association (NPELRA); 12 of the state affiliates of NPELRA;[1] and the City of Eugene, Oregon.[2]

The National Public Employer Labor Relations Association (NPELRA) is a national organization composed of more than 1,250 members who are predominantly full-time city, county, and state government professionals charged with the responsibility for implementing the employment and labor relations policies affecting over four million public employees. NPELRA members reside in all 50 states and are employed by jurisdictions with as few as 25 employees and as many as 200,000 employees.

The 12 state affiliates of NPELRA are separately incorporated organizations whose memberships are composed of individuals who are either NPELRA members or eligible for NPELRA membership. Whereas the focus of NPELRA is national in scope, the focus of the state affiliates is on issues germane to the jurisdiction in question.

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[1] California Public Employer Labor Relations Association, Connecticut Public Employer Labor Relations Association, Florida Public Employer Labor Relations Association, Illinois Public Employer Labor Relations Association, Indiana Public Employer Labor Relations Association, Iowa Public Employer Labor Relations Association, Michigan Public Employer Labor Relations Association, Minnesota Public Employer Labor Relations Association, New York State Public Employer Labor Relations Association, Ohio Public Employer Labor Relations Association, Rocky Mountain Public Employer Labor Relations Association, and Washington Council of Public Personnel Administrators.

[2] Letters from counsel for all parties, consenting to the filing of this brief on behalf of NPELRA and its state affiliates, are being filed with the Clerk. The Brief on behalf of the City of Eugene, Oregon is being filed pursuant to Rule 36(4) of the Rules of Practice of the Supreme Court of the United States which provides that "[c]onsent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented ... for a political subdivision of a State ... sponsored by the authorized law officer thereof." The authorized law officer of the City of Eugene, Oregon, Timothy Sercombe, is a signatory to this brief.

The City of Eugene, Oregon, the second largest in Oregon with a population of 110,000, has approximately 1,100 employees who provide integral governmental services. The terms and conditions of employment, including the normal workweek and eligibility for overtime pay and/or compensatory time off, for virtually all of the City's non-supervisory, non-professional employees, including its police officers and fire fighters, are established by collective bargaining with the exclusive bargaining representatives for said employees.

NPELRA, 12 of its state affiliates, and the City of Eugene, Oregon, as *Amici Curiae* herein, are especially concerned about any reconsideration of the principles of Tenth Amendment immunity from direct federal regulation of integral governmental functions enunciated by the Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976). If *National League of Cities* were to be overturned, it would have a direct and immediate impact on the minimum wage and overtime provisions which *Amici* are responsible for administering. The *Amici Curiae* are concerned that any retreat from the principles of Tenth Amendment immunity established by *National League of Cities* would seriously cripple their sovereign right to structure employer-employee relationships and to determine how governmental services are to be provided to their citizens.

ISSUE TO BE COVERED IN THE BRIEF AMICI CURIAE

While the *Amici Curiae* fully support the position of San Antonio Metropolitan Transit Authority and the American Public Transit Authority on the issues originally briefed and argued during the last term of the Court, this Brief *Amici Curiae* is limited to the following question which the Supreme Court directed the parties to brief and argue in its Order of July 5, 1984:

> "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?"

52 U.S.L.W. 3937 (U.S. S. Ct. July 5, 1984). For the reasons set forth below, the *Amici Curiae* firmly believe that *National League of Cities* was properly decided and should not, therefore, be reconsidered.

SUMMARY OF ARGUMENT

The Supreme Court's decision in *National League of Cities* is predicated upon not only the Tenth Amendment, but also the important concept of federalism which is embodied in many other provisions of the Constitution as well. As Justice Black noted in *Younger v. Harris*, 401 U.S. 37, 44 (1971), "the Framers... [envisioned] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Over the years, the Court has recognized the need, as the arbiter of disputes where there are clashes between federal authority and state sovereignty, to protect the right of States and their political subdivisions to a "'separate and independent existence.'" *National League of Cities*, 426 U.S. at 845. Since the right to establish minimum wages, hours, and the circumstances, if any, under which overtime will be compensated are indisputably aspects of state sovereignty, the essentials of state sovereignty would be devoured if the principles of Tenth Amendment immunity enunciated in *National League of Cities* are not retained.

As a limitation on federal commerce power legislation which directly applies to states and their political subdivisions and *not* on the authority of Congress to regulate private activities, the decision in *National League of Cities* is well within the mainstream of constitutional jurisprudence. Indeed, for a vast majority of this Nation's existence no one even suggested, let alone seriously advanced, the notion that the Federal Government could directly tell States and their political

subdivisions how to structure their employer-employee relationships in areas of integral governmental functions. For example, in *City of Newark and State, County and Municipal Workers of America, Local 277 and Board of Transportation of the City of New York and Transport Workers Union of America, et al.*, Case No. 47, (National War Labor Board, 1942), *reprinted in* C. Rhyne, *Labor Unions and Municipal Employe Law* 226 (1946), the National War Labor Board observed — at the very time that the authority of Congress to regulate private activities under the Commerce Clause was being resoundingly affirmed by the Court — that "[i]t has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions." *Id.* at 228.

Since *National League of Cities* was decided in 1976, the Court has clearly articulated and carefully defined the standards for reviewing Tenth Amendment claims of immunity under *National League of Cities.* These decisions have been subscribed to by a substantial majority of the Court and have been applied in numerous contexts. Since there is no need or justification to reconsider *National League of Cities*, the doctrine of *stare decisis* strongly supports the conclusion that the Court should reaffirm *National League of Cities.* To do otherwise would be to abdicate the Court's constitutional responsibility "to keep the balance between the States and the nation outside the field of legislative controversy." *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting). The balance struck in favor of Tenth Amendment immunity in *National League of Cities* is, as Justice Blackmun held, "necessarily correct." 426 U.S. at 856.

ARGUMENT

I. THE HOLDING IN *NATIONAL LEAGUE OF CITIES* IS IN THE MAINSTREAM OF CONSTITUTIONAL JURISPRUDENCE.

At the outset, it should be emphasized that *National League of Cities'* principle of Tenth Amendment immunity from direct federal regulation under the Commerce Clause does not impede or intrude upon the plenary authority of Congress under the Commerce Clause to regulate private activity affecting interstate commerce. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 286, 290-91 (1981); *FERC v. Mississippi*, 456 U.S. 742, 759 (1982); *National League of Cities*, 426 U.S. 833, 840.

Nevertheless, Appellant Garcia asserts that the Court's Commerce Clause decisions upholding federal regulation of private activity are equally applicable to federal regulation of the integral governmental functions of States and their political subdivisions. This, however, was certainly not the contemporaneous understanding of the breadth of federal authority under the Commerce Clause.

The modern precedent establishing the infinite variety of private activity which is subject to federal regulation under the Commerce Clause dates from the Court's decision in *Jones & Laughlin Steel Corp. v. NLRB*, 301 U.S. 1 (1937), and perhaps reached its zenith with the Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942). That the contemporaneous understanding of the Court's Commerce Clause decisions in cases like *Wickard v. Filburn* did *not* extend to the authority to regulate terms and conditions of the employees of States and their political subdivisions is dramatically demonstrated by the decision of the National War Labor Board in *City of Newark and State, County and Municipal Workers of America, Local 277, and Board of Transportation of the City of New York and Transport Workers Union of America, CIO, and Transport*

Workers Union of Greater New York, Local 100, CIO, Case No. 47 (1942), *reprinted in* C. Rhyne, *Labor Unions and Municipal Employe Law* 226 (1946).

In *City of Newark*, the National War Labor Board unanimously ruled that it did "not have jurisdiction over labor disputes between state governments, including political subdivisions thereof, and their public employes." *Id.* After noting that "well established doctrines in American law pertaining to the sovereign rights of state and local governments clearly exclude such disputes from the jurisdiction and powers of the Board" and that "[t]here is no doctrine more firmly established in American jurisprudence than the one that state governments and their subdivisions within the sphere of their own jurisdiction are sovereign," *id.*, the National War Labor Board, in an opinion authored by public member Wayne Morse, stated:

> It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its powers and jurisdiction. The employes involved in the instant cases are performing services for political subdivisions of state governments. *Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employes would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government.*

Id. at 228 (emphasis added). Among the members of the National War Labor Board joining in this *unanimous* decision were public members George W. Taylor and Frank P. Graham and Union members George Meany and Matthew Woll.

It should also be emphasized that *National League of Cities'* doctrine of Tenth Amendment immunity applies to congressional commerce power legislation; it has not been applied to legislation passed by Congress under other sections of the Constitution.[3] *See Bell v. New Jersey and Pennsylvania*, 103 S. Ct. 2187, 2197 (1983)("Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty"); *State of New Hampshire v. Marshall*, 616 F.2d 240 (1st Cir.), *appeal dismissed*, 449 U.S. 806 (1980)(Tenth Amendment challenge to Federal Unemployment Tax Act amendments which extended benefits to State employees was rejected where statute was enacted under spending power, not commerce power); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) ("*National League of Cities* immunity doctrine not applicable where Congress legislates under § 5 of the Fourteenth Amendment"); *City of Rome v. United States*, 446 U.S. 156, 179 (1980)(Tenth Amendment places no restriction on congressional power "to enforce the Civil War Amendments 'by appropriate legislation' ").[4]

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[3] This is not to suggest, however, that the Tenth Amendment is not relevant when considering the constitutionality of federal laws or regulations passed under other clauses of the Constitution. *See, e.g., Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("If the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well.").

[4] Amici do not understand the Appellees to be contesting the authority of Congress pursuant to the Spending Clause to condition the receipt of funding under the Urban Mass Transit Act of 1964 (UMTA), 49 U.S.C. §§ 1601-1618 (1976 and Supp. V 1981), upon their willingness to abide by the conditions set forth in said Act. At least one lower federal court has rejected a challenge to UMTA based on *National League of Cities*. *City of Macon v. Marshall*, 439 F. Supp. 1209, 1217 (M.D. Ga. 1977)("While Congress cannot directly command or force a state or municipality to comply with federal wage and

(Footnote continued on following page)

The Court's decision in *State of Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), dramatically illustrates the difference between the limits of congressional commerce power when legislating against States qua States and when Congress exercises its authority under the Spending Clause. At issue in *State of Oklahoma* was whether federal highway funds could be withheld or other sanctions imposed if the United States Civil Service Commission determined that a member of the Oklahoma Highway Commission had engaged in impermissible political activity. The State of Oklahoma challenged the section of the Hatch Act that permitted such sanctions as unconstitutional on the ground they "invade the sovereignty of a state in such a way as to violate the Tenth Amendment ...." 330 U.S. at 142. The Court upheld the challenged section of the Hatch Act, stating:

> While the United States is not concerned with and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.

330 U.S. at 143. *See also Bell v. New Jersey and Pennsylvania*, 103 S. Ct. 2187, 2197 (1983); *FERC v. Mississippi*, 102 S. Ct.

(Footnote continued from preceding page)

hour concepts, it may pursuant to the spending clause of the Constitution fix the terms and conditions upon which money from the United States Treasury will be allotted and disbursed to the States and their political subdivisions.").

To reaffirm *National League of Cities*, as Amici urge the Court to do, does not necessarily mean that Congress is precluded from enacting legislation covering the same subject matter under the Spending Clause rather than the Commerce Clause. Nor is this a distinction without a difference. Unlike the FLSA which applies directly to States and their political subdivisions without giving them any opportunity to opt out, federal legislation enacted under the Spending Clause permits States and their political subdivisions to decide whether they want to accept the conditions attached to the receipt of federal funds. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

2126, 2141 (1982) ("... the Court has recognized that valid federal enactments may have an effect on state policy — and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority"). Accordingly, it must be emphasized that the instant case involves the Commerce Clause, *not* the Spending Clause.

The concept of state sovereignty embodied in *National League of Cities* is predicated not only on the Tenth Amendment, but also on the structural assumption of the Constitution that the several states are to remain separate and meaningful decision-making, functioning governmental entities. *See* C. Black, *Perspectives in Constitutional Law* 40 (1963); L. Tribe, *American Constitutional Law* 241, 310 (1978). Recognition of the concept of federalism as a structural assumption of the Constitution has been recognized by the Court for many years. For example, in *Lane County v. Oregon*, 74 U.S. 71, 76 (1869), the Court stated:

> [T]he people of each State compose a State, having its own government, and endowed with the all the functions essential to separate and independent existence. ... [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.

While the political process affords certain checks and balances, it has long been recognized that the Court has a constitutional obligation to protect the essential role of the States in our federal form of government. As Justice Douglas observed in *New York v. United States*, 326 U.S. 572, 594 (1946)(Douglas, J., dissenting):

> The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. ... The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy.

Much more recently Judge Minor Wisdom observed that "Federal commerce power legislation that treats states in a

manner inconsistent with this constitutional assumption is therefore constitutionally suspect." *State of Texas v. United States*, 730 F.2d 339, 356 (5th Cir. 1984).

Significantly, an overwhelming majority of the Court has affirmed the basic conclusion of *National League of Cities* that application of the FLSA to states and their political subdivisions unmistakably interferes with an attribute of state sovereignty that is " 'essential to [a] separate and independent existence.' " 426 U.S. at 845. As Justice Blackmun observed in *FERC v. Mississippi*, 102 S. Ct. 2126, 2138, ". . . having the power to make decisions and to set policy is what gives the State its sovereign nature." As Justice Brennan observed in *EEOC v. Wyoming*, 103 S. Ct. 1054, 1061, n.11 (1983), ". . . some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment."[5]

If application of the Fair Labor Standards Act to employees of States and their political subdivisions employed in integral governmental functions is not deemed to vitally affect the sovereign rights of States, it is hard to imagine what kind of federal commerce power legislation would. In this regard, it is

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[5] The establishment of the terms and conditions of employment for employees of States and their political subdivisions has never been a major concern of the Federal Government. *See Jackson Transit Authority v. Local Division 1285*, 102 S. Ct. 2202, 2207 (1982). On the other hand, there is a very substantial body of legislation enacted by the States and their political subdivisions concerning the wages, hours, and other terms and conditions of employment of their employees. *See* U.S. Dept. of Labor and U.S. Dept. of Commerce, *Labor-Management Relations in State and Local Governments: 1980* State and Local Government Special Studies No. 102 (1980). Indeed, whether or not employees should receive overtime payments has been dealt with extensively by state legislatures. *Cf. e.g.*, Minimum Wage Law, Ill. Rev. Stat. Ch. 48 § 1004a(2)(D) (1984) (state overtime provisions not applicable to employees of any governmental body) *with* Minimum Wage Law, Mich. Comp. Laws § 408.384a (1984) (state and local employees covered by State overtime provisions).

well to keep in mind the following comments of Professor Tribe:

> Of course, no one expects Congress to obliterate the States, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.

L. Tribe, *American Constitutional Law* 302 (1978). *See FERC v. Mississippi*, 102 S. Ct. 2126, 2145 (1982) (Powell, J., concurring in part and dissenting in part).

II. THE PRINCIPLES OF TENTH AMENDMENT IMMUNITY ENUNCIATED IN *NATIONAL LEAGUE OF CITIES* HAVE BEEN CAREFULLY ARTICULATED, WELL-DEFINED, AND CONSISTENTLY FOLLOWED IN SUBSEQUENT CASES.

While the *National League of Cities* decision consists of Justice Rehnquist's plurality opinion (joined by Chief Justice Berger and Justices Stewart and Powell) and Justice Blackmun's concurring opinion,[6] in subsequent decisions the Court has clearly articulated and well defined the standards to be used in judicially reviewing the constitutionality of congressional commerce power legislation. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), the Court, in an opinion by Justice Marshall, held that a *National League of Cities* challenge to legislation enacted by Congress under the Commerce Clause must satisfy each of the following three requirements:

> First, there must be a showing that the challenged statute regulates the 'States as States.' . . . Second, the federal

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[6] The principle of Tenth Amendment immunity articulated in *National League of Cities* was clearly presaged by the Court's earlier decision in *Fry v. United States*, 421 U.S. 542 (1975), in which Justice Marshall, on behalf of the Court, stated that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547, n.7.

> regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' . . . And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'

452 U.S. at 288. In addition, the court in *Hodel* noted that even if these three requirements are met, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288, n.29. This latter consideration effectively assimilates into the standards for reviewing Tenth Amendment claims under *National League of Cities* the "balancing approach" mentioned by Justice Blackmun in his concurring opinion in *National League of Cities*. *National League of Cities*, 426 U.S. at 856. *See FERC v. Mississippi*, 102 S. Ct. 2126, 2139, n.28 (1982)(opinion by Justice Blackmun).[7]

These standards have been consistently used by the Court in evaluating Tenth Amendment immunity claims based on *National League of Cities*. *See e.g., United Transportation Union v. Long Island Railroad Co.*, 102 S. Ct. 1349, 1353 (1982); *FERC v. Mississippi*, 102 S. Ct. 2126, 2139, n.28 (1982); *EEOC v. Wyoming*, 103 S. Ct. 1054, 1060-61 (1983). Moreover, and significantly, these standards for reviewing *National League of Cities* claims have been subscribed to by a substantial majority of the Court. Indeed, two of the four dissenting justices in *National League of Cities* have authored opinions utilizing the aforementioned standards. *EEOC v. Wyoming*, 103 S. Ct. at 1060-61 (opinion by Justice Brennan);

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[7] In fact, in his opinion on behalf of the Court in *Reeves, Inc., v. Stake*, 447 U.S. 429, 438, n.10 (1980), Justice Blackmun quoted with approval from Justice Rehnquist's opinion in *National League of Cities*. Citing *National League of Cities*, Justice Blackmun in *Reeves* stated that "[c]onsiderations of sovereignty independently dictate that market-place actions involving 'integral operations in areas of traditional governmental functions' — such as the employment of certain state workers — may not be subject even to congressional regulation pursuant to the commerce power." *Id.*

Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. at 288 (opinion by Justice Marshall).[8]

Given the careful delineation of the standards governing review of Tenth Amendment claims based on *National League of Cities* and the repeated utilization of these standards in numerous decisions over the past few years,[9] the Amici respectfully submit that there is absolutely no need to reconsider the decision in *National League of Cities*. To the contrary, it should once again be reaffirmed as it was, *inter alia*, in *United Transportation Union v. Long Island Railroad Co.*, 102 S. Ct. 1349 (1982); *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983); and *FERC v. Mississippi*, 102 S. Ct. 2126, 2142, n.32 (1982).

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[8] Indeed, even Justice Stevens joined without comment the Court's opinions in *United Transportation Union v. Long Island Railroad Co., supra*, and *FERC v. Mississippi, supra*, in which the Court analyzed and resolved Tenth Amendment claims based on *National League of Cities* in accordance with these standards. In fact, in *South Carolina v. Regan*, 104 S. Ct. 1107, 1136, n.18 (1984), Justice Stevens in his concurring opinion used these standards in rejecting a Tenth Amendment claim based on *National League of Cities*.

[9] This is not to deny that, even with carefully articulated and well-defined standards for reviewing claims based on *National League of Cities*, the various Justices might reach different results albeit applying the same standards. *See, e.g., EEOC v. Wyoming*, 103 S. Ct. 1054 (1983). There are, of course, numerous other examples where the Court has split in its application of the same constitutional standard to a given set of facts.

III. IMPOSITION OF THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE FLSA AT THIS LATE DATE WOULD STILL HAVE A DEVASTATING IMPACT ON STATES AND THEIR POLITICAL SUBDIVISIONS.

In *National League of Cities,* Justice Rehnquist identified a number of evils that would be inherent if States and their political subdivisions were required to apply the FLSA to employees providing integral governmental services:

—It would result in a "forced relinquishment of important governmental activities . . . ." 426 U.S. at 847.

—It would displace "state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." 426 U.S. at 847.

—It would directly penalize "the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose" and would result in a "congressionally imposed displacement of state decisions [which] may substantially restructure traditional ways in which the local governments have arranged their affairs." 426 U.S. at 849.

With respect to the latter item, Justice Rehnquist noted that application of the FLSA to employees of States and local governments would likely "have the effect of coercing the States to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." 426 U.S. at 850. He also referred to the likely impact which the FLSA would have on the practice of providing compensatory time off rather than cash compensation for overtime worked.

The foregoing impacts which Justice Rehnquist identified are even more valid today than they were when he wrote his opinion in 1976. Take, for example, application of the FLSA's overtime requirements to employees of state and local govern-

ments. The most recent survey data concerning the hours of work for firefighters employed by units of local government shows that:

> Firefighters work an average of 52 hours . . ., with great variation in the practices reported by cities. Median and third quartile figures equal 56 hours per week, indicating that firefighters in the largest of cities reporting average 56-hour work weeks.

International City Management Association, *The Municipal Yearbook 1984* 145 (1984). Most jurisdictions also continue to have compensatory time off policies, *i.e.*, when an employee works beyond his/her normal work week, he/she is granted time off without loss of pay at some future time in lieu of receiving cash compensation for the overtime worked. *See, e.g.*, R. Pruim, *A Study of State Government Employee Benefits* 27-29 (1983); E. Dickson & G. Peterson, *Public Employee Compensation: A Twelve City Comparison* 64-65 (Los Angeles), 116 (Detroit), 127 (Houston), 201 (San Francisco) (2d ed. 1981); and NPELRA members and members of its various state affiliates (who assist in the formulation of wage and benefit policies and are responsible for negotiating collective bargaining agreements at state and local levels) also report that the use of compensatory time is exceedingly common among public employers.

That the impact of applying the FLSA to States and their political subdivisions would be as great, if not greater, today than it would have been in 1976 can be inferred also from the impact on the City of Eugene, Oregon, one of the Amici herein. The normal work week specified in the City's most recent collective bargaining agreement with the International Association of Firefighters for fire suppression and ambulance person-

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[10] *See* International City Management Association, *The Municipal Yearbook 1984* 151-92 (1984), for comprehensive survey data setting forth the duty hours per week for police, fire, and refuse collection and disposal employees employed by the more than 1,300 communities with populations ranging from 10,000 to over 1,000,000. These statistics demonstrate that a substantial number of communities continue to employ firefighters for a duty week which is substantially in excess of 40 hours.

nel is 56 hours.[10] The City estimates that the cost to pay these employees time and one-half for all hours in excess of 40 per week would be over $600,000! Application of the FLSA to the City of Eugene's employees would, as Justice Rehnquist said in *National League of Cities*, directly penalize the City "for choosing to hire governmental employees on terms different from those which Congress has sought to impose" and would undoubtedly result in a substantial restructuring of the "traditional ways in which the [City of Eugene, Oregon has] arranged [its] affairs." 426 U.S. at 849.

IV THE DOCTRINE OF *STARE DECISIS* STRONGLY SUPPORTS REAFFIRMING THE PRINCIPLES OF TENTH AMENDMENT IMMUNITY ENUNCIATED IN *NATIONAL LEAGUE OF CITIES*.

While the doctrine of *stare decisis* does not require that constitutional pronouncements must stand for all time, it does strongly counsel that constitutional pronouncements by the Court, and especially recent constitutional pronouncements by the Court, should not be lightly cast aside. As this Court recently stated in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2487 (1983), in reaffirming *Roe v. Wade*, 410 U.S. 113 (1973):

> . . . the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.

As in *City of Akron*, " [t]here are especially compelling reasons for adhering to *stare decisis* in applying the principles of [*National League of Cities*]." 103 S. Ct. at 2487, n.1. As was the case in *Roe v. Wade*, *National League of Cities* "was considered with special care. It was first argued during the [1974] Term, and reargued — with extensive briefing — the following Term." *Id.* And, as has been the case with *Roe v. Wade*, ". . . the Court repeatedly and consistently has accepted and applied the basic principle" of Tenth Amendment immu-

nity set forth in *National League of Cities* in subsequent decisions. *See Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981); *United Transportation Union v. Long Island Railroad Co.*, 102 S. Ct. 1349 (1982); *FERC v. Mississippi*, 102 S. Ct. 2126 (1982); *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983). As in *City of Akron*, it is respectfully submitted that the Court should "respect it [*i.e.*, the doctrine of *stare decisis*] and reaffirm [*National League of Cities*]." *City of Akron*, 103 S. Ct. at 2487.

There is one additional fact which strongly supports application of the doctrine of *stare decisis* in the instant case. Since the Court's decision in *National League of Cities*, States and their political subdivisions have structured employer-employee relationships with respect to minimum wages, hours, overtime, and compensatory time off practices based on their understanding that they were under no obligation to comply with the dictates of the Fair Labor Standards Act.

There can be no doubt but that the manner in which States and their political subdivisions have recently established or reestablished terms and conditions of employment for their employees, especially with respect to hours of work, overtime, and compensatory time off provisions, is directly contrary to what would be mandated if the Fair Labor Standards Act were applicable to them. As set forth above, the average work week for firefighters, whether established by collective bargaining agreement or otherwise, is now in excess of 50 hours and in many, if not most, communities is 56 hours. Moreover, most State and local public employers have recently adopted or reaffirmed policies, whether through collective bargaining or otherwise, of compensating employees who work beyond their normal work week by granting them time off at a later date without loss of pay (*i.e.*, compensatory time off or "comp time," as it is commonly known in the public sector, in lieu of receiving direct overtime wage payments).

To overrule *National League of Cities* and hold that the mandatory provisions of the Fair Labor Standards Act are

directly applicable to State and local employers would fly directly in the face of their settled expectations based on *National League of Cities* and subsequent decisions which have reaffirmed and institutionalized its holding. *See Patsy v. Board of Regents of the State of Florida*, 102 S. Ct. 2557, 2560, n.3 (1982) ("... whether overruling [prior] decisions would frustrate legitimate reliance on their holdings" must be taken into account). It would vitiate important provisions in hundreds of bargaining contracts covering thousands of public employees. The impact of such a decision—economic and otherwise—cannot be overemphasized.

CONCLUSION

The right of the States and their political subdivisions to establish the terms and conditions of employment of their employees employed in integral governmental functions, including their wages, hours, and provisions governing overtime compensation, if any, is indisputably among the sovereign rights which may not be directly regulated by the Federal Government under the Commerce Clause. This principle — implicit in *Fry v. United States* — was made explicit in *National League of Cities* and has been repeatedly reaffirmed by the Court in the past four years. No reasoned justification has been presented — indeed, none exists — for reconsideration of the principles of Tenth Amendment immunity set forth in *National League of Cities*. The decision was then, and is now, "necessarily correct." 426 U.S. at 856 (Blackmun, J., concurring). Accordingly, *Amici* respectfully request this Court to affirm the judgment of the District Court in the instant case and, in doing so, reaffirm *National League of Cities*.

Respectfully submitted,

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Nos. 82-1913 and 82-1951

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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE SECRETARY OF LABOR ON REARGUMENT

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In view of the exhaustive briefing that the issues in this case have already received, we focus this reply

brief on several recurring themes in appellees' supplemental briefs that reflect a fundamentally flawed understanding of the relationship between the federal government and the states respecting regulation of activities affecting interstate commerce.

1. Appellees do not question that the regulation of minimum wages and overtime compensation paid to employees of mass transit operators pursuant to the Fair Labor Standards Act is a proper exercise of Congress's Commerce Clause authority. Nor do they question that, pursuant to the explicit command of the Supremacy Clause, such legislation enacted under the Commerce Clause binds all within the jurisdiction of the United States and overrides inconsistent state law.

Notwithstanding these moderate introductory premises, however, appellees would ultimately transmute the carefully delimited "functional doctrine" recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and its progeny into "a sacred province of state autonomy" of unlimited scope—a notion that the Court has previously rejected (*EEOC* v. *Wyoming*, 460 U.S. 226, 236 (1983)). This remarkable transformation is to be accomplished by effectively stripping the intergovernmental immunity doctrine of any requirement that challenged federal legislation be shown to "undermine the role of the states in our federal system" by displacing "basic state prerogatives" in a manner that threatens the very vitality of the states (*United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 686-687 (1982)).

We appreciate that the development of a complex, modern, interdependent, industrial economy has the

practical effect in the twentieth century of lending to Congress's power to regulate commerce an impact on "local" activities that exceeds the impact of federal legislation on such activities in the eighteenth century. But it is also true that the states have dramatically expanded *their* activities in this interval, thrusting themselves into roles that substantially affect interstate commerce. In order to provide a wide range of services unknown to the Framers, states today employ a vast labor force that constitutes a major segment of the labor market; state services represent a key sector of the national economy. See *Fry* v. *United States*, 421 U.S. 542, 548 (1975). Against this backdrop of evolving forms of interdependence in the national economy, and overlap in the exercise of state and federal powers, the governing constitutional standard must protect the distinctive attributes of state sovereignty while giving intended effect to the explicit authority conferred upon Congress to regulate interstate commerce in the public interest.

Thus, in our briefs filed last Term, we explained that the central vice of the Fair Labor Standards Amendments of 1974, which were struck down in *National League of Cities* insofar as they applied to certain "traditional governmental functions," was the abrupt federal intrusion affecting the organization of core services that had been firmly entrenched in the public sector long before the enactment of the Fair Labor Standards Act. These Amendments disrupted a wide range of settled patterns of state and local government administration. No similar intrusion results from the application of the FLSA to the public sector of the transit industry. Transit has traditionally been a private sector activity. Widespread

public sector participation is a recent development, resting, to a significant degree, on the availability of substantial federal subsidies. Moreover, Congress found that absent federal minimum wage regulation public transit carriers were competing on unfair terms with private carriers.

As we explained in our supplemental brief filed this Term, unless state services and patterns of operation are entrenched prior to the development of a federal regulatory presence in the field, federal legislation applicable to state activities cannot be said to displace state prerogatives or to impair the vitality of the states. This carefully tailored conception of the scope of intergovernmental immunity is dictated by the nature of that doctrine as a "functional" one designed to safeguard the essential attributes of state sovereignty (*Wyoming*, 460 U.S. at 236), while at the same time preserving federal authority against erosion (*Long Island R.R.*, 455 U.S. at 687). It is also congruent with the doctrine of implied state immunity from federal taxation, which teaches that the states may not, by expanding their field of operations, deprive federal power of its "accustomed and reasonable scope" (*New York* v. *United States*, 326 U.S. 572, 589 (1946) (opinion of Stone, C.J.)).

Appellees, however, would dispense with a showing of displacement of basic state decisions regarding organization of integral operations as a precondition for operation of the immunity doctrine. Appellees would thus adopt the rule that Acts of Congress, although within the proper confines of the commerce power, may be "pre-empted" by the states. Under appellees' view, the states remain essentially free to enter a field subject to federal regulation and to interpose a portable immunity, thereby depriving con-

gressional authority to regulate commerce of its "accustomed and reasonable" ambit. Appellees thus reject the teaching of the tax immunity cases, discard the requirement that a federal intrusion into the domain of established state activity be shown, and abandon protection for the established scope of congressional power.

To be sure, appellees seek to temper their radical doctrine of state pre-emption of federal law by suggesting various considerations to be weighed in assessing the states' claims of immunity. See APTA Supp. Br. 45-46 & n.81; SAMTA Supp. Br. 38 n.28, 43, 46 n.33. But even assuming that these tests supply a workable limit upon state pre-emption of federal authority (but see pages 6-8, *infra*), they do not justify the operation of this unprecedented doctrine even within its delimited scope. The various tests proposed by appellees at best provide some measure of the strength of the states' interest in offering a particular service. As *Long Island R.R.* reveals (455 U.S. at 686-687), however, the reasonableness of state participation in a given field of service does not control the federalism question. Absent the displacement of settled patterns of state organization in established service areas—the form of regulation that is presumptively interdicted under *National League of Cities*—there is no reason why states entering fields of activity affecting interstate commerce should be insulated from nondiscriminatory federal regulatory legislation.[1]

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[1] Appellees' response to the analysis we have proposed is largely to condemn it as a "static historical test" (APTA Supp. Br. 43-44; SAMTA Supp. Br. 39). But this epithet is simply inaccurate; the rule we propose accords the states substantial latitude to expand their operations free of federal regulation. See Gov't Supp. Br. 21-23. The only element of

2. The standards proposed by appellees to place some limit upon state pre-emption of Congress's Commerce Clause authority are subjective, shifting in their application, difficult to administer and, in the final analysis, simply unrelated to the federalism interests of the states that *National League of Cities*

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stasis introduced by our formulation of the scope of state immunity concerns the constitutional validity of Acts of Congress regulating activity affecting commerce, which could not be placed in jeopardy simply because the states have expanded their services.

Equally unfounded is appellees' suggestion (APTA Supp. Br. 44-45) that the test we propose threatens the states' ability to expand their activities into areas that have been regulated by Congress. Wage and overtime standards such as those in the FLSA have no such exclusionary effect. They merely require the states entering a field of service to abide by nondiscriminatory worker protections applicable to all other employers in the field.

Appellees also contend that their radical restructuring of the intergovernmental immunity doctrine is necessary to prevent enactment of a host of draconian measures ostensibly waiting in the wings. See, *e.g.*, SAMTA Supp. Br. 26; Nat'l Inst. Mun. Law Officers Supp. Br. 8. But, as Justice Frankfurter cautioned in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 490 (1939), enduring constitutional doctrine cannot be premised on " 'pernicious abstractions,' " such as hypothetical federal legislation dictating to the states "how many policemen should be on the streets of our cities, and what type of shoes they should wear." It should not be casually presumed that such legislation would ever be enacted. See SAMTA Supp. Br. 35 & n.27, discussing various unenacted bills to amend the FLSA. Should our confidence in Congress's appreciation of the limits of its competence and the importance of federalism ever prove unwarranted, the resulting legislation might well fail constitutional scrutiny, quite apart from the doctrine of intergovernmental immunity. See *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968); *Panhandle Oil Co.* v. *Mississippi, ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

was intended to safeguard. For instance, notwithstanding APTA's blithe assurance that immune functions are "readily identifiable" (Supp. Br. 42), APTA ultimately proposes that a court confronted with a claim of state immunity "look to various indicators" (Supp Br. 45), "including" five factors that are prominently listed (Supp. Br. 45-46) and others that are buried in footnotes or merely incorporated by reference (Supp. Br. 46 n.81). Among the factors mentioned are significant intractable economic questions, such as whether the service can be provided by the private sector and whether the service can be delivered at a profit. They also include important policy judgments, such as whether abandonment of the service is an unacceptable alternative. These kinds of issues fit more comfortably within the legislative than the judicial sphere, because of the institutional resources and policy-making capacity required to resolve them. Nor is there any reason to believe that the answers to these questions will remain constant over time. Thus constitutional doctrine would be erected on a foundation of sand and would be whipsawed by a changing economic or social climate, burdening both the courts, which would have to reassess periodically the scope of federal authority to regulate a given field of commerce, and litigants, who would be deprived of the very advantages of stability in the law touted by appellees elsewhere in their argument (APTA Supp. Br. 15-16 n.13).

Appellees evidently—and quite understandably—hesitate to follow the novel doctrine of state preemption of federal Commerce Clause authority to its logical conclusion. See, *e.g.*, SAMTA Supp. Br. 38 n.28; APTA Supp. Br. 46 n.81. At the same time, they rule out all consideration of whether challenged federal regulatory legislation disrupts established

patterns of state or local government organization, thus abandoning the functional rationale for the *National League of Cities* holding. As we have already observed (page 5, *supra*), the categorical tests appellees have proposed for defining the scope of state immunity fail to measure the threat, if any, posed to state sovereignty by application of nondiscriminatory federal regulation of activities affecting interstate commerce, but at best measure only the justification for the states' choice to enter the field. Ironically, the subjective multi-factor tests appellees would apply to limit the corrosive doctrine of state pre-emption would result in federal courts second-guessing the decisions of state and local governments as to the services that they should provide to their residents. Under our federalist system, however, that is precisely the kind of issue that ordinarily ought to be reserved for state decision. On the other hand, the decision of a state to undertake activities previously within the private sector that affect interstate commerce, whether undertaken for reasons that are objectively compelling or for reasons that might be deemed frivolous, idiosyncratic, or short-sighted, affords no justification for depriving Congress of its unquestioned constitutional authority to regulate interstate commerce in accordance with its sovereign judgment as to the requirements of the public interest.[2]

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[2] Appellees deny (APTA Supp. Br. 40-41; SAMTA Supp. Br. 37-39) that the policies underlying the FLSA apply to their own operations. But Congress has explicitly considered this very question and reached the opposite conclusion. See Gov't Opening Br. 47-48. The Commerce Clause, moreover, is, first and foremost, a grant of plenary authority to Congress to determine what regulation of commerce the public interest requires. Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379

In sum, the principal defect of the tests advanced by appellees and their amici is that their consideration of adverse impacts upon sovereign prerogatives is one-sided. They correctly recognize that the existence of two sets of governments in a federal system poses a potential threat to the "wide latitude" that states must have "in making * * * policy choices." SAMTA Supp. Br. 33. But they fail to acknowledge that this threat runs in both directions. The federalism underpinnings of the Constitution must accommodate not only policy choices made by the states in the exercise of their powers, but also those made by Congress in the exercise of its enumerated powers. An absolute guarantee to either the states or the federal government of "wide latitude in making * * * policy choices" within the proper spheres of their respective law-making authority will necessarily impinge on the sovereign prerogatives of the other.

The great strength of the Court's test, established in *National League of Cities* and *Hodel* v. *Virginia*

U.S. 241, 258-259, 261-262 (1964). Substantial deference is accordingly due to Congress's judgments in this field. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981). Furthermore, the congressional determination that the salutary policy of preventing unfair competition requires application of the FLSA to public as well as private mass transit carriers is one that the courts lack special competence to assess. Appellees would nevertheless discount the very congressional judgment that led to the enactment of the challenged legislation, analyzing the case much as though Congress had never acted and the question were accordingly whether state laws or actions burden interstate commerce to such a degree that they run afoul of the "dormant" Commerce Clause. See also Am. Br. of California, et al. 44-45 & n.19 (relevant inquiry is: "How much of a burden on interstate commerce is created by exempting publicly employed transit workers from the FLSA?").

Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), and reaffirmed many times since, is that it directly responds to the core problem: two sets of sovereigns whose complete and uninhibited exercise of sovereign power inevitably would bring them into conflict on occasion. It simply will not do to assert the obvious—that essential attributes of state sovereignty must be preserved—without adding the equally obvious: that the constitutional test must recognize the attributes and responsibilities of *both* sovereigns. Since the problem arises from the tension between competing sovereign prerogatives, the optimum solution is not a per se or nearly per se approach that disregards one of those sovereigns. Appellant Garcia's analysis addresses the problem from the national perspective. The various tests advanced by appellees and their amici proceed from the state and local perspective. The Court should instead adhere to the test set forth in *National League of Cities* and *Virginia Surface Mining*, as clarified in our supplemental brief, which provides a structured and workable framework that takes both perspectives into account.

For the foregoing reasons, and the reasons set forth in our previously filed briefs, the judgment of the district court should be reversed.

Respectfully submitted.

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REPLY BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

ARGUMENT

I

A. The Secretary of Labor, the appellees, and various of the *amici curiae* elaborate on the truth that "[o]urs is a federal constitution and a federal system," Sec'y. Supp. Br. at 3, a system in which the states are "repositories of legitimate authority," *id.* at 5. *See also, e.g.*, SAMTA Supp. Br. at 4-9; APTA Supp. Br. at 25-30. This we readily concede. *See* Garcia Supp. Br. at 4. But the undisputable fact that the Framers established a federal system, in which both the national government and the several states would possess "sovereignty" poses, rather than resolves, the question of how power is allocated between the nation and the states in that federal system.

In answer to that question we say that ours is a federal system in the sense that the national government is not granted plenary powers but only expressly enumerated powers, and not in the sense that otherwise valid exercises of those enumerated powers (which include the power "to regulate commerce * * * among the several States") are to be subordinated to considerations of state "sovereignty." We submit that the text of the Constitution, specifically the Supremacy Clause in Article VI and the Tenth Amendment, requires this answer, and that this construction alone is consistent with the intent of the framers of the original Constitution and of that Amendment. Garcia Supp. Br. 5-12.

With respect to the actual language of these two constitutional provisions our adversaries uniformly maintain a discreet silence. And insofar as they seek to defend the limitation on the commerce power adopted in *National League of Cities v. Usery*, 426 U.S. 833 (*"National League"*) by evidence of the original understanding their

effort fails; the constitutional thesis set forth in our prior brief is supported in the very materials they invoke.

B. We begin with Madison's *Federalist* No. 39, which is cited at APTA Supp. Br. 27 for the proposition that "'local or municipal authorities' are not subject within their respective spheres to the general authority." APTA's selective quotation utterly distorts what Madison wrote. In *Federalist* No. 39, Madison in examining the "extent of [the] powers" of the proposed "general authority" explained:

> The idea of a national government involves in it . . . an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority *then the general authority is subject to them, within its own sphere.* In this relation, then the proposed government cannot be deemed a *national* one, *since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.*[1]

Madison thus observed that neither "the local or municipal authorities" nor the proposed "general authority" would be subject to the authority of the other "within its own sphere," and that the "general authority" would be confined to "certain enumerated objects only" and in that sense would not be wholly "national", while as to

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[1] *The Federalist Papers* 245 (C. Rossiter ed.) (only "national" emphasized in original). All our references to the *Federalist Papers* will be to the Rossiter edition and will be referred to as "*Fed. Pap.*"

"*other*" objects the states would enjoy a "residuary and inviolable sovereignty." APTA's quotation omits Madison's statement that the federal government would be supreme within its own sphere—that of the enumerated powers—the very proposition for which we contend.[2]

Madison made the same point in *Federalist* No. 40, on which SAMTA relies. SAMTA Supp. Br. at 5. Madison there stated, as SAMTA notes, that the "States should be regarded as distinct and independent sovereigns." *Fed. Pap.* 249-250. But Madison elaborated on the statement as follows, in words SAMTA omits entirely:

> We have seen that in the new government, as in the old, the general powers are limited; and that the States, *in all unenumerated cases*, are left in the enjoyment of their sovereign and independent jurisdiction. [*Fed. Pap.* 251, emphasis added.]

Appellees also rely on *Federalist* No. 45 (APTA Supp. Br. 27 and SAMTA Supp. Br. 4, 6), quoting Madison's descriptions of the federal government's powers. Again, he made no suggestion that any of these powers—which, as SAMTA notes but APTA does not, include the power to regulate commerce—is in any way limited by the authority of the states.[3] It is also highly significant that in

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[2] SAMTA Supp. Br. 5 does quote that sentence in its entirety, but without appreciation of its true import. The sentence quoted at APTA Supp. Br. 27, n.42 from Hamilton's *Federalist* No. 32 is in accord: ("all authorities of which the States are *not explicitly divested in favor of the Union* remain with them in full vigor") (emphasis added).

[3] APTA also quotes a passage from *Federalist* No. 45 that "the component parts of the State Governments, *will in no instance* be indebted for their appointment to the direct agency of the federal government." APTA Supp. Br. 37, quoting *Fed. Pap.* 291, APTA's emphasis. APTA thereby attempts to convey the impression that Congress may not, in the exercise of one of the enumerated powers, regulate the wages and hours of state employees. *See* APTA Supp. Br. 36-37. APTA's leap from what Madison wrote to its own needs in this case again wrests what Madison said wholly out of

Federalist No. 45, which addressed the question whether "the powers transferred to the federal government . . . will be dangerous to the portion of authority left in the several States," *Fed. Pap.* at 288, Madison began by insisting that this was "a secondary inquiry," *id.*—that if

> the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual states. Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? [*Id.* at 288-289] [4]

In sum, the materials appellees cite from the *Federalist Papers* provide no support for their claim that the Framers intended to subordinate Congress' enumerated powers to considerations of state sovereignty.

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its context. Madison was illustrating the importance of the states under the Constitution by the states' role in appointing the President and the members of the Senate and House of Representatives. The sentence from which APTA quotes contrasts the absence of a like authority in the federal government. Madison was thus using the word "appointment" in the specific sense of choosing particular individuals to hold an office.

[4] In *Federalist* No. 46, Madison added that if "the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proof of a better administration as will overcome all their antecedent propensities. *And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due. . . .*" *Fed. Pap.* at 295, emphasis added. *See also id.* at 294, *quoted* at Garcia Supp. Br. 8-9.

C. The same is true with respect to the materials appellees cite from the constitutional convention. We agree with APTA that these materials indeed show that one reason the Framers decided to "limit[] congressional power to expressly delegated authority was to prevent federal interference with the States." APTA Supp. Br. at 26 and sources cited *id.* n.41. But the constitutional debates also show that having "limit[ed] congressional power to expressly delegated authority," and having established a democratic process for the exercise of such authority, the framers believed that there would be "no danger to the States from the General Government."[5] Thus it is not surprising that appellees are unable to cite any evidence that the Framers saw a need to subordinate the delegated authority of the federal government to considerations of state sovereignty.

Indeed, the debates at the constitutional convention clearly reveal that the notion of subordinating federal authority to state sovereignty is the very antithesis of what the Framers intended. This is perhaps best evidenced by the fact that the convention *defeated* a proposal to preclude Congress from "interfer[ing] with the government of the individual states in any matter of internal policy." *See* Garcia Supp. Br. 6. Gouverneur Morris, leading the opposition, explained that "[t]he internal policy, as it would be called and understood by the States, ought to be infringed in many cases." 2 Farrand 26.

The Framers' great concern, voiced throughout the constitutional convention, was that "the General Government would be in perpetual danger of encroachment from the State Governments," 1 Farrand 356 (Wilson) (*see also*, 1 *id.* 137, 164, 166-67, 363, 552; 2 *id.* 27), and that the states "could not be too carefully guarded against," 1 *id.* 358-59 (Hamilton). Having experienced, during the period of the Articles of Confederation, the "gloomy con-

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[5] The Records of the Federal Convention 356 (Farrand ed. 1911) (hereinafter "Farrand").

sequences," 1 *id.* 358 (Madison), of a national government that was too weak and believing that a weak national government would be "fatal to the internal liberty of all," 1 *id.* 464 (Madison), the Framers decided to "run every risk," 1 *id.* 467 (Madison), to avoid that result. Their plan was "to draw a line of demarkation which would give to the General Government every power requesite for general purposes," 3 *id.* 132 (Madison), and to establish federal supremacy within the area marked out for the federal government.

That this federal system would impair state sovereignty to the extent of the powers delegated to Congress was well recognized. In transmitting the proposed constitution to Congress, George Washington, as president of the constitutional convention, wrote as follows:

> It is obviously impracticable in the federal government of these States, to secure all right of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances, as on the object to be obtained.
>
> • • •
>
> In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. [2 Farrand 667]

D. Appellees likewise derive no support from the fact that "[u]ltimately, the responsibility for mediating the boundaries of federalism devolved, during the course of the Framers' debates, to the federal judiciary." APTA Supp. Br. at 27. The Framers adopted the scheme of judicial review in lieu of a proposal to empower Congress to "negative" laws enacted by the states. *See*

Garcia Supp. Br. at 6 n.3.[6] Thus, the Framers looked to the courts principally to assure that the states would not "encroach upon the national government" which the federalists viewed as a far greater danger than encroachment upon the states by the federal government. See pp. 5-6 *supra*.[7] To the extent the Framers envisioned a role for the judiciary in scrutinizing federal legislation, that role was to assure that the federal government stayed within its enumerated powers.

According to the federalists, if "a question arises with respect to the legality of any power exercised or assessed by Congress," the judiciary would ask a single question: "Is it enumerated in the Constitution. *If it be, it is legal and just.*"[8] At no point did the federalists in arguing

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[6] Appellee APTA accuses us of "distort[ing] the records of the Federal Convention" with respect to the consideration given to authorizing a congressional "negative" or veto. APTA Supp. Br. at 28 n.46. We did not do so. A proposal to empower Congress "to negative all laws passed by the several States contravening, in the opinion of the national legislature, the articles of the union, or any treaties subsisting under the authority of the union," was "agreed" to by the constitutional convention on May 31, 1787. 1 Farrand 54, 61. On June 7 and again on June 8, a proposal "for extending the negative power to all cases" was defeated, thus leaving the negativing power in its original form as passed. 1 *id.* at 162-63, 164-68. On July 17, the convention for the first time voted to delete the negativing clause and substituted instead the Supremacy Clause. 2 *id.* at 21-22, 27-28. On August 23, a motion to reconsider the deletion of the negativing power was made and failed by only one vote, with the opposition principally arguing that a negativing power was "unnecessary." 2 *id.* at 390-91. Thus when Madison wrote to Jefferson at the end of the convention to report on its deliberations, he stated that negativing was "finally rejected by a bare majority." 3 *id.* at 134.

[7] *Federalist* No. 17 at 119 (Hamilton). *See also* 1 Farrand at 131-36 (letter from Madison to Jefferson); *Federalist* No. 45 at 289 (Madison).

[8] 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* at 186 (Virginia) (J. Elliot ed.) (hereafter "Elliot"). *See also e.g.*, 3 *id.* 553 (John Marshall) ("If

for adoption of the Constitution suggest that, "in mediating the boundaries of federalism," the judicial role would be to balance the federal interest in the challenged legislation against considerations of state sovereignty. Rather, the Framers intended *that* balance to be struck through the federal government's political processes and once set to be maintained by the Supremacy Clause.

E. Appellees attribute to the Tenth Amendment a fundamental change in the theory of the Constitution that limits Congress' enumerated powers in the interests of state sovereignty. There is no basis for that claim. The Tenth Amendment was framed by the federalists to respond to a specific and narrow objection voiced by the anti-federalists: that the federal government would not be limited to the enumerated powers because it is universally true "that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers." 3 Elliot at 445 (Patrick Henry).[9]

[Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard"); 2 *id.* 489 (Wilson); 2 *Annals of Cong.* 1897 (Madison) ("If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States"). *See also* Garcia Supp. Br. 7-8 and n.6.

[9] This, of course, was not the anti-federalists' only objection to the proposed constitution; they also—indeed principally—argued, as APTA states, that the powers delegated to the federal government were so broad "as to destroy the[] [states'] capacity to function as governmental entities." APTA Supp. Br. at 30. *See, e.g.*, J. Main, *The Antifederalists* 120-21 (1961); R. Kenyon (ed.), *The Antifederalists* xlvi (1966). But, contrary to APTA's assertion, the Tenth Amendment was not framed to meet this latter objection; to do so would have required rewriting the very heart of the Constitution, so as to remove or modify the powers to raise arms, create a federal judiciary, make treaties, control federal elections, and govern a national capital, all of which the anti-federalists found objectionable. *See* J. Main, *supra*, at 122-23; R. Kenyon, *supra*, at

The purpose of the Tenth Amendment was thus to "remove[] a doubt which many have entertained respecting the matter and give[] assurances that, if any law be extended beyond the power granted by the proposed Constitution . . . it will be an error." 2 Elliot at 131 (John Adams). That is precisely what Madison said in proposing the Amendment to the first Congress. *See* Garcia Supp. Br. 11.[10] And that is precisely what the Tenth Amendment itself says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is not possible to read these words to impose limitations on those powers which *are* "dele-

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xliii-lxix; Rather, insofar as the anti-federalists argued that the delegated powers of the federal government were too broad, the federalists joined the issue and ultimately prevailed.

The materials APTA cites from the North Carolina ratification debates—all from the anti-federalist Samuel Spencer, *see* R. Kenyon, *supra*, at 407—prove the point. (It is noteworthy that APTA relies heavily on North Carolina's consideration of the Constitution. For North Carolina was the one (and only) state in which anti-federalist sentiment was predominant, R. Kenyon, *supra*, at 407, and North Carolina was the one state which initially failed to ratify the Constitution and which was not at first, part of the union, *see* 1 Elliot at 333.) One argument Spencer made against ratification was that the states "may be swallowed up by the great mass of powers given to Congress," 4 *id.* at 51; Spencer objected specifically to a variety of Congress' enumerated powers, 4 *id.* at 52, 75, 136. A second and discrete point made by Spencer was that the federal government could not even be counted upon to stay within its enumerated powers because, although "it ought to be so and should be so understood . . . it is not *declared* to be so." 4 *id.* at 137 (emphasis in original). The Tenth Amendment supplied the declaration Spencer thought missing; that amendment did not alter the powers Spencer found objectionable.

[10] Madison was concerned that absent the Tenth Amendment an "implication" might have arisen from the Bill of Rights "that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure"; Madison viewed this as "one of the most plausible arguments I have ever heard urged against the admission of the bill of rights," and he concluded that it would be useful to meet this argument in some way. 1 *Annals of Cong.* 439.

gated to the United States by the Constitution." And appellees offer no evidence that any of the framers of that Amendment intended any such result.[11]

F. Lacking any other support in the original materials for their attempt to subordinate federal power to state sovereignty, appellees are reduced to arguing that because our economy has developed "from a purely local, to a regional, and ultimately to a national economy," *EEOC v. Wyoming*, 460 U.S. 226, 247 (Stevens, J., concurring), it is necessary to read into the Constitution limitations that the Framers did not intend, and indeed, that are contrary to the scheme of government the Framers established. *See* APTA Supp. Br. at 17-25; SAMTA Supp. Br. at 25-29.[12] This is a call for constitutional revision, *not* constitutional interpretation.

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[11] The question whether Congress may, in the exercise of one of its delegated powers, regulate or otherwise interfere with the exercise by the states of one of the powers (such as their role in the choice of electors for the President (see n.3 pp. 3-4, *supra*)) assigned to the states under the Constitution is therefore a wholly distinct question from the one posed here. In such an instance there would arise a conflict between two provisions of the Constitution, one granting a power to Congress and another granting a power to the states, which it would be the responsibility of this Court to resolve. The problem would be of the same nature as when an Act of Congress in the exercise of one of its enumerated powers is challenged as being contrary to one of the prohibitions in the Constitution such as the First or Fifth Amendment. The latter class of cases is inapposite here because the Tenth Amendment does not in terms limit any of the delegated power of the federal government. And a law which regulates state powers which are not set forth in the Constitution gives rise to no conflict among constitutional provisions, and is therefore subject to the Supremacy Clause which gives priority to the laws enacted pursuant to the Constitution, *viz.*, within Congress' enumerated powers.

[12] Appellee SAMTA attempts to buttress its argument by disparaging the importance of the Commerce Clause. *See* SAMTA Supp. Br. at 6-8. But the entire process of framing the Constitution was set in motion by the Virginia General Assembly which appointed "commissioners" to meet with representatives from other states for the sole purpose of "consider[ing] how far a uni-

As authority for this result SAMTA relies most heavily on two decisions that are now discredited,[13] and one decision that rejects the proposition for which SAMTA contends. In *Missouri v. Holland*, 252 U.S. 416, Justice Holmes wrote not only what is quoted at SAMTA Supp. Br. 28 but the following elided sentences:

> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. [252 U.S. at 434.]

And the point of the opinion—which, of course, upheld the treaty Congress had negotiated—was to exorcise the "invisible radiation" which Missouri had called forth. The entire magnificent passage, with its partial echo of *Federalist* No. 45 (see p. 4, *supra*) conveys Justice Holmes' abiding conviction that the national government is supreme when acting within one of its delegated powers and that those powers must be construed generously "in the light of our whole experience" and "what

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form system in their commercial regulations may be necessary to their common interest and their permanent harmony." 1 Elliot at 114-15. Out of this action came the Annapolis Convention which in turn called for a constitutional convention because the Annapolis delegates concluded that

> the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that, to give it efficacy and to obviate doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system. [1 *id.* at 116-18]

Thus, as Justice Stevens has observed, "the intent of the Framers," in developing the Commerce Clause, was nothing less than "to confer a power on the National Government adequate to discharge its central mission." *EEOC v. Wyoming*, 460 U.S. at 246-47 (concurring opinion).

[13] *United States v. Butler*, 297 U.S. 1 and *Employers' Liability Cases*, 207 U.S. 463, quoted at SAMTA Supp. Br. 26-27.

this country has become." 252 U.S. at 433-435.[14] It was this appreciation of what the Framers had accomplished that led Justice Holmes to dissent from *Hammer v. Dagenhart*, 247 U.S. 251,[15] and to announce in *Sanitary District v. United States*, 266 U.S. 405, 425: "This is not a controversy between equals."

II

In *National League* all the Justices agreed on two points: that the Commerce Clause and the Supremacy Clause mean that congressional regulation of the private sector pursuant to the commerce power preempts state regulation; and that there are areas of state activity that are similarly subject to the overriding force of federal law. In light of these points of agreement, we have argued that if the basic principle of *National League* is reaffirmed, the immunity for state activity should be confined as follows: "Given the range of choices for providing goods and services recognized in this society it simply

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[14] SAMTA misreads *Federalist* No. 34 in the same way (SAMTA Supp. Br. 28): referring to the powers of the national government, Hamilton there wrote, "There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." *Fed. Pap.* at 207, emphasis in original.

[15] The brief for California *et al.* as *amici curiae* contends, in disagreement with *Maryland v. Wirtz*, 392 U.S. 183, 195-197, that "continued state autonomy cannot confidently be made to depend on the Court's authority to identify intrinsic limits on the commerce power." Cal. Br. 23. The single item cited to evidence the perceived danger is Congress' prohibition against child labor:

> Congress *has* used its power under the Commerce Clause to destroy; and so used, the power has been strongly defended. *See Hammer v. Dagenhart*, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting). [Cal. Br. 24, emphasis in original.]

Hammer and *National League* are as one in their apocalyptic rhetoric. "Our system of government [was not] practically destroyed," *Hammer, supra*, 247 U.S. at 276, when that case was overruled; nor would "the National Government . . . devour the essentials of state sovereignty," *National League, supra*, 426 U.S. at 855, if *National League* is overruled in this case.

cannot be said as a general matter that providing goods and services is an 'essential' of state sovereignty. The fact that, as to any given good or service, some entities that are *not* sovereign provide the service while some entities that *are* sovereign do not, demonstrates that such activity is not an essential attribute of state sovereignty." Garcia Supp. Br. 43; *see also id.* at 34-42. Where the states make a pragmatic judgment to engage in the production of goods and services in common with the private sector rather than to avail themselves of the options of regulating, subsidizing or otherwise stimulating that sector, the resulting state activity is, we submit, so closely akin to economic activity in the private sector—and to the state lawmaking activity relating to such activity—as not to warrant a special immunity as an "essential[] of *state* sovereignty" (*National League*, 426 U.S. at 855, emphasis added) in the federal system created by the Constitution. The countersuggestions as to how to delimit the activities that are "essentials of state sovereignty" are nothing less than an effort to remove that limitation and to make the *National League* immunity apply across the board.

The National League of Cities, *et al.* brief as *amici curiae* does not state a theory of state sovereignty as such, but rather argues that "the ability of the states to govern effectively" is worthy of protection and that if a federal action impairs that ability "it must fall unless it carries out a federal interest that overrides the state power, and is tailored to further such interest in the manner least harmful to state authority." NLC Supp. Br. 8. That brief, indeed, expressly calls for the rejection of the "States as States" limitation. *Id.* 28-29. On a similar tack, the California, *et al.* brief rejects any attempt to "define precisely the contours of state sovereignty." Cal. Br. 37. Indeed, the argument is that an "inquiry whether an exercise of state power is 'really' an exercise of sovereignty fails to respect state democratic choices" and "should be abandoned" in favor of

the rule that "a rational exercise of admitted power", even in a proprietary capacity, is immune from federal authority. *Id.* 38-40.

The appellees' briefs, while cast in more modest terms, seek in practical terms, an equally far-reaching state sovereignty immunity. APTA's premise is that "When Congress attempts to regulate directly the internal decision-making process of state government" Congress "endangers the State's authority over its actions." APTA Supp. Br. 34. This is the predicate for the claim that "state authority to determine the wages and overtime compensation of its employees is . . . a core state function." *Id.* 36. On that theory, any federal regulation of public employee wages would be invalid, subject only to a balancing test to weigh the federal interest. While recognizing that the three-pronged test of *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, mandates an inquiry into whether the federal law impairs "integral operations in areas of traditional governmental functions," APTA would eviscerate that requirement by a five-factor test that in substance brings all generally-provided state functions within the *National League* immunity. *Id.* 45-46. *See also* to the same effect SAMTA Supp. Br. 30-31.

III

Within the framework of *National League* the controversy between the parties has centered on whether mass transit is "a traditional governmental function." We agree with the Secretary of Labor that if (contrary to our basic position) the states are to retain the current form of commerce power immunity, the immunity should be confined to the functions the states have historically performed.

In disagreeing with the Secretary's historical test to define which are "traditional functions" APTA asserts

that it is "newly created out of whole cloth; it cannot be woven out of precedent." APTA Supp. Br. 44. APTA is plainly mistaken. The Secretary's brief quotes *in extenso* from Chief Justice Stone's concurring opinion in *New York v. United States*, 326 U.S. 572, 588-589, which applies just such a historical test. *See* Sec'y. Supp. Br. 20. The same analysis was even more fully developed in Justice Stone's opinion for the Court in *Helvering v. Gerhardt*, 304 U.S. 405, 416-417.[16] The *National League* opinion in turn quotes approvingly from Chief Justice Stone's opinion in *New York* (426 U.S. at 843) and the tax immunity doctrine provided the closest analogy for the commerce power immunity declared in *National League*. Although, in agreement with Justice Stone, we believe that the analogy is unsound

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[16] Justice Stone wrote:

> With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the states when the Constitution was adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself. But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. See *South Carolina v. United States*, 199 U.S. 437, 454-455. [304 U.S. at 416-417, footnote omitted. *See* also *id.* at 416 quoted at Garcia Supp. Br. 26-27.]

As an example of activities which are not immune, Justice Stone referred to "a street railway business taken over and operated by state officers as a means of effecting a local public policy. *Helvering v. Powers*, 293 U.S. 214." 304 U.S. at 418.

(see Garcia Supp. Br. 22-23, quoting *United States v. California*, 297 U.S. 175, 185), the grounds stated by him for a historical definition of the scope of the tax immunity doctrine are at least equally valid if the commerce power immunity is to be retained. To paraphrase Justice Stone, "the national [commerce] power would be unduly curtailed if the state, by extending its activities, could withdraw from it subjects of [regulation] traditionally within it." *Cf.* 326 U.S. at 589. The opposite view is inconsistent with the constitutional value embodied in the grant to Congress of the power to regulate commerce.[17]

For its part, APTA, though not acknowledging any important alteration in *National League*, would throw the "traditional governmental functions" test overboard. First, APTA objects that any historical standard "will not allow state and local governments to perform their traditional function of serving the needs of their commu-

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[17] APTA, ignoring Justice Stone's opinions, quotes that of Justice Frankfurter in *New York*, and that of Justice Black in *Gerhardt*. APTA Supp. Br. 44, 45, n.78. The former citation is truly remarkable, for if Justice Frankfurter's non-discrimination standard were carried over to the present subject, appellees would lose this case; the FLSA does not discriminate against the states. Indeed, if the states' immunity from commerce power regulation were confined to a protection from congressional discrimination, the immunity would rarely, if ever, come into play.

Justice Black's concurrence in *Gerhardt* is contrary to the Court's opinion on the very point for which APTA quotes it and is therefore not authoritative. His disagreement with Justice Stone on that issue continued in the 1945 Term when Justice Black cast a dissenting vote in *New York*. But the two Justices were in agreement later at that term in *Case v. Bowles*, 327 U.S. 92, that the tax immunity doctrine does not provide a valid analogy with respect to the other enumerated powers. *See* Garcia Supp. Br. 18-19. As his opinion in *Case*, and his vote in *Wirtz* make clear, "Our Federalism", as Justice Black viewed it, does not incorporate the doctrine that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the power of the other." 327 U.S. at 101, quoted at 392 U.S. 194.

nity in changing times." APTA Supp. Br. 45. Under this formulation—accomplished by shifting the key word, "traditional"—each and every governmental service would qualify for the *National League* immunity, thereby nullifying this important limitation on the doctrine. Alternatively, APTA proposes to determine "whether a particular activity of state and local government is a 'traditional governmental function,'" APTA Supp. Br. 45, by pointing to five "indicators." We need not stop to examine these individually, for they have two fatal defects in common: 1) none has anything to do with whether an activity is "*traditional*", even giving the most generous meaning to that term; 2) none takes into account the constitutional value, discussed above, of preventing the erosion of the federal government's authority in the area of its delegated powers.

As three Courts of Appeals have recognized, the latter consideration has especial force in the case of mass transit because the dramatic shift from private to public operation in the last twenty years is due to "inexorable forces put into motion" by Congress' enactment of UMTA and the consequent enormous federal financial contribution of capital and operating grants. *See Kramer v. New Castle Transit Authority*, 677 F.2d 308, 309-310 (C.A. 3), *cert. denied*, 459 U.S. 1146. Appellees' contention that the federal government thereby forfeited its previous power to regulate mass transit is not only diametrically opposed to the theory of the tax immunity precedents, but would expand *National League* far beyond its expressed purpose to protect "the States' 'separate and independent existence.'" 426 U.S. at 851, *quoting Coyle v. Oklahoma*, 221 U.S. 559, 580. See also pp. 20-21 of our Brief and 6-10 of our Reply Brief on the original argument.[18]

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[18] Appellees and *amici curiae* also distort the balance of the federal and state interests at stake in this case. They say that the states' interest is the power to exercise the "sovereign" function of providing services and of determining the wages and hours of

IV

In defending the application of the *National League* doctrine to the political subdivisions of states, SAMTA Supp. Br. 46-47 points to decisions in which the employees and obligations of such subdivisions were pro-

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their employees. *E.g.*, SAMTA Supp. Br. 31-34; NLC Supp. Br. 24. Even granting arguendo that these are truly sovereign functions, the balance cannot be kept true without stating the federal interest at the same high level of generality. The FLSA is an exercise of the federal government's unquestionably sovereign power to regulate interstate commerce; governing the national economy through laws such as the FLSA is at least as "fundamental a duty" of the federal government as "providing services" is for the states.

SAMTA diminishes the federal interest in enforcing the FLSA against state and local governments to the two reasons supporting the FLSA's "enterprise" concept as explained in *Wirtz*. SAMTA Supp. Br. 35-37. But while these are entirely sufficient for holding, as the Court did, that Congress acted within its commerce power when it adopted the "enterprise" concept in 1961 (392 U.S. at 188-193, a holding undisturbed by *National League*), they by no means exhaust the reasons for adopting the FLSA, or for including the states and their subdivisions within its purview. Other purposes of the minimum wage requirement are, in briefest summary, to improve the earning power of the covered employees and benefit the economy generally by putting a floor on wages and increasing purchasing power. The purposes of the maximum hour provisions are to "discourage overtime work and to spread employment" (426 U.S. at 899, quoting the appellees' brief in *National League*), and also "to compensate those who labored in excess of the statutory hours for the wear and tear of extra work . . ." *Bay Ridge Co. v. Aaron*, 334 U.S. 446, 460. (H. Rep. No. 93-913 reprinted in [1974] U.S. Code Cong. & Adm. News, 2811, 2817.) As Congress reaffirmed when it extended the FLSA to public employees generally, the FLSA also vindicates a "call upon [the] Nation's conscience"; it assures that the conditions under which members in this society labor are, and are perceived to be, "fair." Congress there also quoted with approval Justice Burton's observation in *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516: "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality . . . " *Id.* By holding that most public employees must be excluded, *National League* overturned the congressional judgment, and overrode the federal interest in "[b]readth of coverage".

tected by the tax immunity doctrine. The point is a fair one if one begins with the premise that the tax immunity doctrine affords a proper analogy for an implied limitation on the commerce power as we do not, *see* Garcia Supp. Br. 16-17. (SAMTA and the other defenders of *National League* are, however, necessarily selective in their adherence to this analogy, see pp. 14-17, *supra.*) Moreover, although assuredly in point under appellees' constitutional theory the decisions cited by SAMTA ought not to be followed because those decisions represent another manifestation of the absolutism of the tax immunity doctrine as enunciated in *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871) (shortly followed by *United States v. Railroad Company*, 17 Wall. (84 U.S.) 322 (1873) cited in SAMTA Supp. Br. 46), but disapproved in *Gerhardt, supra*, and *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466.

A critical examination of this aspect of the *National League* doctrine similar to that undertaken in those cases with respect to the tax immunity doctrine should for the reasons stated at Garcia Supp. Br. 44-46 likewise lead to bringing the Tenth Amendment decisions in line with those under the Eleventh Amendment which immunizes only the states and not their subdivisions.[19]

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[19] SAMTA Supp. Br. 48 asserts too that the Tenth Amendment is more protective of the states against the federal government than is the Eleventh. No explanation of the basis for that supposed difference is given. (Indeed, in another context SAMTA analogizes these amendments. SAMTA Supp. Br. 44.) The appellees' reliance in responding to our argument in this regard on constitutional provisions which impose prohibitions on the states is equally unsound. SAMTA Supp. Br. 47, APTA Supp. Br. 35. Plainly a state may not escape such restrictions by subdelegating its powers. Conversely, the functions which the Constitution expressly assigns to the states may be performed only by the states themselves, and not by their subdivisions.

V

Appellees' contention that *National League's* restrictions on the Commerce Power should be retained by adherence to *stare decisis* (APTA Supp. Br. 7-15; SAMTA Supp. Br. 22-24) fails to acknowledge that *National League* overruled by the narrowest of margins, the Court's six-to-two decision in *Maryland v. Wirtz, supra,* a carefully reasoned opinion, then 8 years old, written by Justice Harlan whose sensitivity to the concerns of the states in a wide range of federal-state controversies is too well known to require documentation. In overruling *Wirtz* at the close of the *National League* opinion ("One final matter requires our attention," 426 U.S. 852) the Court confronted only that portion of Justice Harlan's opinion which relied on *United States v. California, supra,* and the critical portion of *California* was characterized as "dicta" and disapproved, carrying *Wirtz* along. 426 U.S. at 854-855. The other precedents followed in *Wirtz,* and the Court's independent analysis in that case were ignored.

Of course we do not propose that because *National League* gave *Wirtz* considerably less than its due as precedent, this Court should casually overrule *National League.* But we do submit that the doctrinal importance of the constitutional issue is so great that, as *National League* appears to recognize, considerations of *stare decisis* are entitled to relatively slight weight, and that in reexamining whether *National League's* limitation on the commerce power should survive, the Court should give to *Wirtz* and its antecedents the full weight which the force of their reasoning merits.

CONCLUSION

For the foregoing reasons, and those stated in our earlier briefs, the judgment of the district court should be reversed.

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